

# FROM CONTRACT TO STATUS: COLLABORATION AND THE EVOLUTION OF NOVEL FAMILY RELATIONSHIPS†

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*The past decade has witnessed dramatic changes in public attitudes about and legal status for same-sex couples who wish to marry. These changes demonstrate that the legal conception of the family is no longer limited to traditional marriage. They also raise the possibility that other relationships—cohabiting couples and their children, voluntary kin groups, multigenerational groups, and polygamists—might gain legal recognition as families. This Article probes the challenges faced by aspiring families and the means by which they could attain their goal. It builds on the premise that the state remains committed to social-welfare criteria for granting family status, recognizing as families only those categories of relationships that embody a long-term commitment to mutual care and interdependence and, on that basis, function well to satisfy members' dependency needs. Groups aspiring to legal recognition as families must overcome substantial uncertainties as to whether they meet these criteria if they are to obtain the rights and obligations of legally recognized families. Uncertainty contributes to a lack of confidence in the durability and effectiveness of their relationships on the part of the aspiring family members themselves, the larger social community, and, ultimately, the state. The Article develops an informal model to illustrate the nature of these uncertainties, as well as the solutions to the possible obstacles they create. Using a hypothetical group consisting of two adult men and two adult women in a polyamorous relationship, we show how legal status for family groups can result from an evolutionary process for overcoming uncertainties that uses collaborative techniques to build trust and confidence. Collabora-*

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† The title draws on (and challenges) Henry Maine's famous statement that "the movement of the progressive societies has . . . been a movement from Status to Contract." Henry Sumner Maine, *Ancient Law* 170 (Transaction Publishers 2002) (1866) (emphasis omitted); see Brian H. Bix, *Private Ordering in Family Law*, 23 J. Am. Acad. Matrimonial Law. 249, 259 n.30 (2010) (discussing domestic-relations context of Maine's statement).

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*tive processes have been shown in other settings to be effective mechanisms for creating trust incrementally and thus appear to offer a way forward for novel families. The Article describes how the successful movement to achieve marriage rights for LGBT couples has roughly conformed to the collaborative processes we propose, and it identifies the absence of meaningful collaboration as one factor explaining the stasis that characterizes the status of unmarried cohabitants. This evidence supports the prediction that the future progress of other aspiring family groups toward attaining legal status may depend on how well they are able to engage the collaborative mechanisms that smooth the path from contract to status.*

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## INTRODUCTION

Many contemporary scholars and policy advocates challenge the privileged status of marriage, arguing that the state should recognize and support other family relationships.<sup>1</sup> Historically, this challenge has been

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1. Often critics argue for the abolition of legal marriage. See, e.g., Martha Albertson Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* 226–36 (1995) [hereinafter *Fineman, Neutered Mother*] (challenging privileged status of marriage and arguing marital privilege should be transferred to families based on caretaker and dependent); Nancy D. Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law* 98–109, 123–45 (2008) [hereinafter *Polikoff, Beyond Marriage*] (arguing privileging marriage harms other families); Judith Stacey, *Unhitched: Love, Marriage, and Family Values from West Hollywood to Western China* 204–05 (2011) [hereinafter *Stacey, Unhitched*] (arguing marriage should be abolished and diverse range of families recognized because marriage is declining and family diversity dominates); see also Mark Goldfeder, *It’s Time to Reconsider Polygamy*, CNN (Dec. 16, 2013, 6:37 PM), <http://cnn.com/2013/12/16/opinion/goldfeder-polygamy-laws> (on file with the *Columbia Law Review*) (advocating legalization of polygamy). A Canadian commission argued for legal protection of a broad range of families. See Law Comm’n of Can., *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships* 1–7

based on a feminist critique of marriage as a patriarchal institution that oppresses women. But the trend toward greater gender equality in the formal status of husbands and wives has led recently to a more generalized claim that the elevated status of marriage demeans and unfairly disadvantages other families.<sup>2</sup> These arguments have been influential in the successful movement toward recognition of the marriage rights of same-sex couples. They apply as well to the (as yet unsatisfied) demands by scholars and advocates that other family categories based on adult relationships<sup>3</sup>—cohabiting couples and their children, voluntary kin groups,<sup>4</sup> polygamists, and multigenerational family groups raising children—deserve the legal recognition enjoyed by married couples.<sup>5</sup>

The view that heterosexual marriage should be an exclusive legal status was grounded traditionally in conventional moral and religious norms. Cohabiting, polygamous, and same-sex unions were considered illicit and therefore undeserving of legal protection. As contemporary moral norms have evolved, however, the historical justification for this exclusive legal status has weakened.<sup>6</sup> Recent surveys by the Pew Foundation and other polling organizations show growing public acceptance of cohabitation relationships as well as same-sex unions.<sup>7</sup>

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(2001) (describing growing diversity of family forms in Canada and arguing for extension of rights and obligations to those families).

2. See Suzanne B. Goldberg, *Why Marriage?*, in *Marriage at the Crossroads: Law, Policy, and the Brave New World of Twenty-First-Century Families* 224, 235 (Marsha Garrison & Elizabeth S. Scott eds., 2012) [hereinafter *Marriage at the Crossroads*] (arguing that argument against marriage as privileged legal status has shifted to one focused on harm to nonmarital families); see also Stacey, *Unhitched*, *supra* note 1, at 8–12, 142–51 (advocating diversity and challenging feminist opposition to polygamy).

3. We assume that a parent raising a child alone constitutes a family that warrants societal support and resources, but our focus is on families based on adult relationships: For our purposes, “families” are relationships that warrant a special legal status based on their perceived social value in satisfying dependency needs. See *infra* text accompanying notes 37–43 (explaining how families fill dependency needs); *infra* notes 44–46 (discussing qualities of family relationships).

4. Voluntary kin groups are often described as families of choice—family relationships developed by parties without blood or legal ties. See Dawn O. Braithwaite et al., *Constructing Family: A Typology of Voluntary Kin*, 27 *J. Soc. & Pers. Relationships* 388, 396–402 (2010) (describing types and functions of voluntary kin relationships); see also *infra* Part III.C.2.b (discussing legal challenges voluntary kin groups face).

5. See *supra* note 1 (citing advocates who challenge privileged status of marriage).

6. For a discussion of this trend, see *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (holding contracts between cohabitants enforceable); see also *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (striking down criminal sodomy law). However, moral norms against illicit sexual relationships do not explain why nonconjugal relationships failed to qualify as family relationships. See *infra* Part III.C.2 (describing how nonconjugal groups face unique challenges to legal recognition).

7. See, e.g., Pew Research Ctr., *The Decline of Marriage and Rise of New Families* 7–8 (2010) [hereinafter *Pew Research Ctr., The Decline of Marriage*], available at <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf> (on file with the *Columbia Law Review*) (describing changes in social values regarding the family, including greater acceptance of same-sex marriage).

Some observers suggest that even polygamous relationships are becoming “normalized,” pointing to the popularity of the television series *Big Love* and *Sister Wives*.<sup>8</sup> Although social acceptance of a broader range of intimate relationships need not result in their recognition by the state as legal families, it is clear that religious and moral sanctioning of nontraditional families has diminished, lowering a barrier to societal recognition of novel<sup>9</sup> family groups.

The transformation in social attitudes creates the possibility of a legal regime that fosters pluralism, allowing individuals to pursue their own vision of the good life in forming family relationships. On this view, fundamental notions of autonomy and fairness support the claim that the liberal state should offer individuals the freedom to undertake whatever family relationships maximize their utility and then should support those families equally.<sup>10</sup> From a social-welfare perspective, however, personal satisfaction is not the sole basis for conferring family status.<sup>11</sup> Families serve the critically important functions of raising children, caring for elderly persons, and otherwise satisfying society’s dependency needs. Only relationships that fulfill those functions adequately are likely to attain legal status as families. But a puzzle remains: Why, in an era of social tolerance, have novel family categories,<sup>12</sup> with the exception of gays and lesbians seeking marriage rights, failed to attain legal recognition? The answer to this question turns on the effects of substantial uncertainties that impede the pathway to legal status for novel family forms.

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8. Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 Colum. L. Rev. 1955, 1979–80 (2010) (suggesting how regulation based on partnership model could normalize polygamous relationships); see Goldfeder, *supra* note 1 (discussing public attitudes toward plural marriage). *Big Love*, which ran for five seasons from 2006 to 2011, was nominated for Emmy and Golden Globe awards. *Big Love: About the Show*, HBO, <http://www.hbo.com/big-love#/big-love/about/index.html> (on file with the *Columbia Law Review*) (last visited Feb. 4, 2015). For a discussion of polygamy, see *infra* Part III.C.1.

9. We use the terms “aspiring” and “novel” interchangeably, recognizing that some groups, such as multigenerational families, are not new. By novel families, we mean to designate groups that lack (and might qualify for and aspire to) legal status.

10. The autonomy norm suggests, for example, that the state might provide a menu of family forms from which individuals could choose the option best suited to their needs. See Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 Wash. & Lee L. Rev. 1565, 1589–1601 (2009) (arguing generally for family pluralism as intrinsic value and challenging imposition of mandatory obligations on cohabitants); see also William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules and Override Rules*, 100 Geo. L.J. 1881, 1890 (2012) [hereinafter Eskridge, *Family Law Pluralism*] (making similar argument).

11. See *infra* Part I.B (discussing social value of family relationships).

12. Our analysis of the path to legal recognition focuses on novel family *categories* (not individual novel families) primarily because we predict this is the course regulators are likely to take. As with marriage, once a category is recognized, individuals seeking to register their relationships may be subject to administrative requirements but not to inquiry about whether their *relationship* satisfies the criteria discussed in the text.

This Article develops an informal model to illustrate those uncertainties as well as solutions to the possible obstacles they create. The uncertainties begin with questions the parties themselves will have about the viability of their novel relationship, but they also include public ambivalence and the skepticism of lawmakers about the quality of the novel group's relationships. The discrete challenges facing an aspiring family are a function of three conditions that we label novelty, social isolation, and nonverifiability. We describe a hypothetical group consisting of two adult men and two adult women in a polyamorous relationship who are initially uncertain whether their family form can succeed in maintaining a long-term commitment to mutual care, interdependency, and formal equality. In addition, even as a few such successful families evolve, at first they are likely to be socially isolated, lacking the necessary affiliations with each other to form a mutually supportive normative community and to pursue their goals of public acceptance and legal recognition. Finally, these aspiring families face regulatory uncertainty: The state will lack the information needed to verify the acceptable functioning of the novel class as a precondition to licensing individual families.

Uncertainty in each of these dimensions contributes to a lack of confidence (on the part of the aspiring family members themselves, the larger social community, and, ultimately, the state) in the durability and effectiveness of novel relationships to fulfill family functions adequately. Yet, high levels of uncertainty have been resolved successfully in other contexts through a process of collaboration in which trust in the relationship and confidence in a successful outcome develop incrementally. This raises the question whether collaborative processes can also address the conditions that impede the legal recognition of aspiring families. Here, we draw on successful collaborations in commercial settings to describe in a stylized manner an evolutionary, multistage process through which the novel group can obtain the rights and obligations of legally recognized families.<sup>13</sup> Initially, by forming collaborative agreements, the parties can build trust and confidence in both the quality and durability of their relationships.<sup>14</sup> Further, by affiliating in networks, isolated novel families can build a normative community that can provide support, facilitate social awareness and acceptance, and overcome political obstacles to attaining their legal objective.<sup>15</sup> Finally, through an iterative process, the

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13. The stages are presented as distinct but, as discussed *infra* Part III.A, they are likely to overlap substantially.

14. See Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine, 110 *Colum. L. Rev.* 1377, 1405–10 (2010) [hereinafter Gilson, Sabel & Scott, Braiding] (showing how collaborative agreements build trust); *infra* Part II.B.2 (suggesting hypothetical polygamous family could build trust through collaborative contracting).

15. See Walter W. Powell, Neither Market nor Hierarchy: Network Forms of Organization, 12 *Res. Organizational Behav.* 295, 323–26 (1990) [hereinafter Powell, Market nor Hierarchy] (explaining advantages of network formation); *infra* Part II.B.3 (discussing challenges polygamous families face in seeking integration into larger social community).



state can develop confidence in the capacities of the novel family category to fulfill family functions.<sup>16</sup>

The model sheds light on both the success and failure of two contemporary aspiring family groups in securing legal protection for their relationships. First, it illuminates the process through which same-sex couples have attained marriage rights.<sup>17</sup> These couples seeking official recognition of their families faced the uncertainties we describe, and we argue that the movement toward marriage equality has roughly tracked the evolutionary process we model. In the early period, despite public opprobrium, same-sex couples entered committed relationships that were often maintained secretly.<sup>18</sup> But the AIDS crisis and the lesbian baby boom clarified the vulnerability of these family relationships,<sup>19</sup> spurring the formation of a powerful normative community and a network of advocacy groups aimed at gaining public acceptance and legal protection.<sup>20</sup> Legal recognition of family status has then proceeded through an iterative process as regulators and the public have gained confidence in the quality of committed same-sex relationships. Second, the model suggests why cohabitation relationships as a class have failed to attain protected family status.<sup>21</sup> Here the sorting problem is acute because cohabiting couples are a heterogeneous category with diverse goals and expectations for their relationships. This heterogeneity, together with the defining decision not to marry, impedes the creation of networks and

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16. See Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 88 N.Y.U. L. Rev. 170, 176–78 (2013) [hereinafter Gilson, Sabel & Scott, *Contract and Innovation*] (describing taxonomy of contract innovation); *infra* Part II.B.4 (discussing state's difficulties in verifying functionality of novel family groups).

17. See *infra* Part III.A (discussing this process).

18. See William N. Eskridge, Jr., *Democracy, Kulturkampf, and the Apartheid of the Closet*, 50 Vand. L. Rev. 419, 440–41 (1997) (arguing laws discriminating against homosexuals in the early period “reinforce[d] a regime of the closet”).

19. George Chauncey, *Why Marriage? The History Shaping Today's Debate over Gay Equality* 96–111 (2004) (arguing HIV/AIDS and assisted reproductive technology were key factors in push for same-sex marriage).

20. This movement included an effective strategy of signaling to the broader society the marriage-like nature of gay and lesbian relationships. See *infra* Part III.A (describing strategies used in same-sex marriage movement to appeal to majority).

21. See *infra* Part III.B (discussing incomplete legal protections for cohabitation relationships). Despite law-reform efforts, see, e.g., *Marvin v. Marvin*, 557 P.2d 106, 113–14, 116, 122–23 (Cal. 1976) (“[A] contract between nonmarital partners, even if expressly made in contemplation of a common living arrangement, is invalid only if sexual acts form an inseparable part of the consideration for the agreement.”); Am. Law Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations* §§ 6.01–.06 (2000) (creating and enforcing financial obligations between unmarried cohabitants), cohabitants have struggled to establish claims for support and property rights, see, e.g., *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892, 901 (Ct. App. 1993) (rejecting support claim of cohabitant at end of twenty-one-year relationship).

sends a confusing signal about the nature of cohabiting unions.<sup>22</sup> Moreover, the state has not found an effective means of distinguishing those cohabiting partners who are committed to assuming long-term family obligations from others who are not.

Finally, the model predicts the course (though not the success) of other novel families seeking legal recognition. Individuals in polyamorous, multigenerational, and voluntary kin groups may perform family functions and aspire to the legal status of established families.<sup>23</sup> In our society, these groups are truly novel in the sense that they are not dyadic unions modeled on marriage. They face the uncertainties of novelty, isolation, and nonverifiability to varying degrees, and, in order to succeed, each group must overcome its own set of challenges. For example, like same-sex couples, polyamorous groups are likely to confront public hostility, but they also face the challenge of creating and enforcing understandings among multiple parties sufficient to sustain well-functioning families. Voluntary kin groups are diverse and face the challenges created by heterogeneity. In each case, the model suggests the impediments to legal recognition and how they might be overcome through the various collaborative processes we describe.

At the outset, it may be helpful to make a few clarifying points. This Article's approach is primarily descriptive and predictive, rather than normative. We recognize that American law places primary responsibility for satisfying dependency needs on private families and assume that this "neoliberal" approach is likely to continue.<sup>24</sup> In our view, the assumption of greater responsibility for dependency by the state would enhance social welfare, but the Article does not directly address this important policy issue. We also assume that families based on marriage likely will continue to enjoy broad public support and a privileged legal status, and to be viewed as embodying qualities associated with satisfactory family functioning. The goal is to explore under what conditions and through what mechanisms other family categories that embody those qualities could attain a similar status.

The Article proceeds as follows. Part I describes demographic changes in American families and in public attitudes over the past half

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22. Some cohabitants are in marriage-like unions while others cohabit specifically to avoid family obligations. See *infra* Part III.B (discussing differing functions of cohabitation).

23. See *infra* Part III.C (exploring challenges nondyadic families encounter).

24. But see Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State* 3, 24–26 (Yale Law Sch., Public Law Research Paper No. 511, 2014), available at <http://ssrn.com/abstract=2459972> (on file with the *Columbia Law Review*) (challenging neoliberal approach). See generally Maxine Eichner, *The Supportive State: Families, Government, and America's Political Ideals* (2010) (arguing modern liberal theory discounts families and offers too narrow a conception of the government's responsibility for dependency); Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* 53–54 (2004) (arguing for collective responsibility for dependency).



century that have created the possibility that other family forms could be accorded the legal status and resources that marriage enjoys. After describing the useful social functions of families, Part I argues that marriage is likely to continue to qualify for special treatment but that other groups successfully performing family functions can also aspire to similar recognition.

Part II develops an informal model that describes predictable obstacles to legal recognition and a multistage collaborative process by which a hypothetical aspiring family might overcome these obstacles. Successful collaborations mature into contracts for mutual care and support with enforceable obligations that define relationships in terms of the maintenance of family functions. As these commitments become widely observable, a collaborative network forms among aspiring families: A set of emerging social norms reinforces the stability of those relationships, and the families and their leaders signal the quality of their relationships to the larger society, increasing awareness and acceptance. Ultimately, the state verifies that family functions are performed adequately and extends formal recognition through a collaborative process that certifies the novel family category.

Part III first shows that the still-evolving process that has led a growing number of states to grant marriage rights to gays and lesbians is consistent with the predictions of the collaborative approach. It then turns to cohabitation and explains how the model developed in Part II sheds light on the failure of cohabitants to gain substantial legal protection. Finally, Part III examines the unique uncertainties facing other novel families, including polygamous and voluntary kin relationships, and briefly addresses the question of legal recognition for groups assuming more limited family obligations. Part III concludes that collaborative processes designed to build confidence and trust between the family members and with others (including the state) offer these and other aspiring families the means to resolve uncertainty and ultimately attain legal recognition.

## I. MARRIAGE AND THE SPECIAL LEGAL STATUS OF FAMILIES

As the public has increasingly come to accept nonmarital families, the claim of marriage critics that the law should recognize and support a broader range of families has become more compelling. This Part briefly sketches these social changes. It then explores the key social functions of families, as well as the qualities of relationships that perform these functions well and are likely to qualify for legal recognition. It examines the privileges, benefits, and obligations that currently are assigned to marriage and predicts that, although many contemporary marriages fall short, marriage as a category is likely to continue to provide the template for well-functioning families for the public and lawmakers alike. The analysis also leads us to conclude that other relationship categories that

function satisfactorily to fulfill family functions qualify to receive the same level of support and societal resources.

A. *Family Change and the Evolution of Social Attitudes*

The question that this Article addresses—under what conditions and through what means might the law recognize novel families—is the subject of serious discussion only because of dramatic changes in family demographics and social attitudes over the past half century. Until the 1960s, both the law and entrenched social norms prescribed heterosexual marriage defined by ascribed gender roles as the only acceptable family form.<sup>25</sup> Much has changed since that time. To begin, the proportion of families based on marriage has declined. A recent Pew survey found that barely fifty percent of American adults were married, the lowest rate ever reported.<sup>26</sup> Meanwhile, the percentage of couples living together in nonmarital unions has increased steadily, as have the number of children born to unmarried mothers, often cohabiting (at birth) with their children's fathers.<sup>27</sup> As a result of the increase in nonmarital families and their relative instability (as well as higher divorce rates among married couples than in earlier generations), more children live in families that include their mothers, new partners, and step and half siblings. Gay and lesbian couples also live together and raise children in a way that was uncommon fifty years ago. And as the traditional nuclear family has become less prevalent, multigenerational groups, in which grandparents assist with childcare and adult children care for their parents, have taken on new importance.<sup>28</sup> Less often highlighted but also a part of the picture of family diversity in the early twenty-first century are other nonconjugal families made up of relatives or groups of unrelated adults, sometimes called voluntary kin.<sup>29</sup>

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25. See generally Marsha Garrison & Elizabeth S. Scott, Legal Regulation of Twenty-First Century Families, in *Marriage at the Crossroads*, supra note 2, at 303 (describing initial prevalence and recent decline of families based on marriage).

26. Pew Research Ctr., Barely Half of U.S. Adults Are Married—A New Low (2011), available at <http://www.pewsocialtrends.org/files/2011/12/Marriage-Decline.pdf> (on file with the *Columbia Law Review*).

27. The most comprehensive research on children in unmarried families is the ongoing longitudinal Fragile Families Study, conducted by Sara McLanahan and her colleagues. See, e.g., Sara McLanahan & Christine Percheski, Family Structure and the Reproduction of Inequality, 34 *Ann. Rev. Soc.* 257, 258 (2008) (reporting fifty percent of nonmarital parents lived together at child's birth); Sara McLanahan & Irwin Garfinkel, Fragile Families: Debates, Facts and Solutions, in *Marriage at the Crossroads*, supra note 2, at 142, 151 (describing study).

28. The Supreme Court has acknowledged the importance of grandparents in children's lives as families have changed. See *Troxel v. Granville*, 530 U.S. 57, 70–73 (2000) (holding parents' objection to grandparent visitation must be given substantial weight but declining to hold grandparent-visitation statute unconstitutional).

29. See Natalie Angier, The Changing American Family, *N.Y. Times* (Nov. 25, 2013), <http://www.nytimes.com/2013/11/26/health/families.html> (on file with the *Columbia*

The factors contributing to these demographic changes have been much discussed<sup>30</sup> and are not of central importance to our analysis. What is important is the generally tolerant public response to these social developments. Recent polls indicate that most adults in this country have positive or at least neutral views about a broad range of families, expressing accepting attitudes toward nonmarital couples with (and without) children and same-sex couples.<sup>31</sup> In many states, a majority of citizens endorse same-sex marriage.<sup>32</sup> Younger adults are more accepting of nonmarital families than their elders,<sup>33</sup> suggesting that attitudes may become increasingly tolerant over time. In a 2010 poll, only unmarried women having children without a partner met with respondents' disapproval.<sup>34</sup>

This account oversimplifies somewhat how the public views novel intimate relationships. To be sure, tolerance does not extend to all relationships. Polygamy, for example, continues to be subject to public censure; fundamentalist Mormons and other religious groups practicing polygamy have generally been viewed as pathological, arousing public alarm about the sexual coercion of young girls.<sup>35</sup> Certainly less controversial, but also less familiar, are nonconjugal voluntary kin groups, which

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*Law Review*) (discussing diversity of modern American families); see also Braithwaite et al., *supra* note 4, at 396–402 (studying voluntary kin).

30. See, e.g., Angier, *supra* note 29 (positing and discussing several factors). Contributing factors to family change include the sexual revolution, the availability of birth control, the decline in religious observance, the women's equality movement, etc. See *id.*

31. See Pew Research Ctr., *The Decline of Marriage*, *supra* note 7, at 40–69 (presenting results of several surveys demonstrating more positive response toward nonmarital couples).

32. See *Changing Attitudes on Gay Marriage*, Pew Research Ctr. (Sept. 24, 2014), <http://www.pewforum.org/2014/09/24/graphics-slideshow-changing-attitudes-on-gay-marriage/> [hereinafter *Pew Research Ctr., Changing Attitudes*] (on file with the *Columbia Law Review*) (reporting results of poll showing that national average of those who support same-sex marriage is fifty-two percent). A large number of states recognize same-sex marriage. See *Same Sex Marriage Laws*, Nat'l Conference of State Legislatures, <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx> (on file with the *Columbia Law Review*) (last updated Jan. 19, 2015) (listing thirty-six states and District of Columbia as recognizing same-sex marriage).

33. Pew Research Ctr., *Changing Attitudes*, *supra* note 32.

34. See Pew Research Ctr., *The Decline of Marriage*, *supra* note 7, at 56 (reporting results of poll showing Americans express most concern about rise in number of single women having children and “are far less concerned” about unmarried gay and lesbian couples raising children).

35. A recent Gallup poll found that eighty-three percent of those surveyed found polygamy to be morally wrong. See Frank Newport & Igor Himelfarb, In U.S., Record-High Say Gay, Lesbian Relations Morally OK, *Gallup* (May 20, 2013), <http://www.gallup.com/poll/162689/record-high-say-gay-lesbian-relations-morally.aspx> (on file with the *Columbia Law Review*). Elizabeth Emens describes the hostility to polygamy generated by opponents to gay marriage. See Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. Rev. L. & Soc. Change 277, 277–84 (2004) [hereinafter Emens, *Monogamy's Law*]. For discussion of public attitudes toward polygamy, see *infra* Part III.C.1.

thus far have attracted little public or political attention.<sup>36</sup> Nonetheless, the recent demographic changes, together with more accepting public attitudes toward a range of families, raise the possibility that other groups besides married couples might gain legal recognition as families.

B. *The Qualities of Well-Functioning Families*

Given that our project is to explore whether novel family categories might attain legal recognition, we must answer a threshold question: Why are families so special, and what are the qualities of adult relationships that are likely to function adequately as families?

In contemporary society, a broad public consensus supports the proposition that (at least some) family relationships have substantial social value and should enjoy a special legal status. The reasons for this consensus are straightforward. As many scholars have noted, families do the important work of satisfying society's dependency needs.<sup>37</sup> Families care for dependent children, prepare them for citizenship, and educate them to be productive members of society.<sup>38</sup> Families also assume responsibility for responding to members' physical and emotional needs created by illnesses, disabilities, old age, and the ordinary stresses of life.<sup>39</sup> Not every family provides necessary or adequate care to its dependent members, of course, but collectively families perform extraordinarily valuable social functions. The state assists families in performing these functions by providing key services and financial subsidies,<sup>40</sup> by recogniz-

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36. Scholars and law-reform groups have shown some interest. See Law Comm'n of Can., *supra* note 1, at 4–7 (discussing voluntary kin groups); see also *infra* Part III.C.2 (describing nonconjugal aspiring families).

37. See Fineman, *Neutered Mother*, *supra* note 1, at 161–64 (“The natural family is the social institution we depend on to raise the children and care for the ill, the needy, the dependent in our culture.”).

38. See generally Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 Wm. & Mary Bill Rts. J. 1071 (2003) (discussing legal treatment of intact and dissolving families). In an earlier article, we described the valuable societal service parents provide and argued that autonomy and state support of parenting is a *quid pro quo* for parents' assuming responsibilities for raising and educating their children—functions that would otherwise be borne collectively. See Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 Va. L. Rev. 2401, 2453–56 (1995) [hereinafter Scott & Scott, *Parents as Fiduciaries*]; cf. Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 Chi.-Kent L. Rev. 1673, 1677 (2001) (“[G]overnment ought to support parents' efforts to nurture and provide for their children, just as workplaces ought to be more ‘parent-friendly,’ better to facilitate parents balancing the demands of ‘work’ and ‘family.’”).

39. In some families, of course, adult members may undertake specialized roles in performing these functions, with some performing direct caretaking services and others providing financial resources that indirectly support caretaking.

40. Government services that assist families in raising children and caring for dependency include free public schools, subsidized day care, Temporary Assistance for Needy Families subsidies, nutrition programs, Medicaid, and social-security spousal and survivor benefits. See generally Janet M. Currie, *The Invisible Safety Net: Protecting the*

ing intimate family bonds, and by defining family rights and obligations.<sup>41</sup> Family members performing their roles responsibly save societal resources that otherwise would be expended in providing adequate care for children and for elderly and disabled persons.<sup>42</sup> Even if the state were to assume a far greater responsibility for satisfying society's dependency needs as many reformers have advocated, families would continue to play a critical role.<sup>43</sup>

Many individuals and groups may assume the burden of caring for others, but not all will attain legal recognition as families. Biological relationship is neither a necessary nor a sufficient condition for protected legal status.<sup>44</sup> The nephew who resides with his aunt and uncle while attending college and assists with babysitting is not in a "family" relationship that is acknowledged by law—though his co-residents are.<sup>45</sup> What then are the qualities that identify adult affiliations as family relationships? In our view, a contemporary family that is based on adult relationships embodies several key attributes: a demonstrated commitment to a long-term emotionally intimate affiliation in which the parties usually live together in a relationship of relative equality; the assumption of responsibility for mutual care (and the care of children or other dependent family members); financial interdependence; and the understanding that members' welfare is prioritized above that of others.<sup>46</sup> Family bonds are built on trust that enables each member to rely on others to fulfill their roles and to "be there" in good times and bad. The nephew in the exam-

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Nation's Poor Children and Families (2006) (discussing safety-net programs); Clare Huntington, *Failure to Flourish: How Law Undermines Family Relationships* 55–80 (2014) (critiquing current policy as inadequate and proposing how law could fully support families).

41. The state recognizes family bonds in guardianship law, in the duty to rescue children and spouses, and in laws governing intestacy. The regulation of property division and support during divorce defines financial spousal obligations. See *infra* notes 52–53 (elaborating on role of divorce regulation).

42. See Jennifer M. Collins, Ethan J. Leib & Dan Markel, *Punishing Family Status*, 88 B.U. L. Rev. 1327, 1355–56 (2008) (describing how special legal protections of families are compensation for services families provide, thereby relieving state of their cost); cf. Fineman, *Neutered Mother*, *supra* note 1, at 230–33 (arguing government should support and compensate families for their critical role in caring for dependency needs); Scott & Scott, *Parents as Fiduciaries*, *supra* note 38, at 2417–18 (describing *quid pro quo* of parental rights as compensation for responsibility over dependents).

43. See *supra* notes 38–39 and accompanying text (describing extent to which family members care for each other).

44. See *Michael H. v. Gerald D.*, 491 U.S. 110, 123–27, 131–32 (1989) (upholding statute denying parental rights to unmarried biological father of child born to married couple).

45. Similarly, three young-adult cousins would likely not be eligible to rent a house zoned for "single-family" residences.

46. Some of these traits might be contested, but this description is consistent with conventional understandings. Courts evaluating whether *de facto* relationships constitute family relationships point to these qualities. See *infra* notes 81, 326 (discussing *de facto* family relationships).



ple is not in a family relationship with his aunt and uncle because the co-residency arrangement is time limited as are any mutual obligations of the parties. The core qualities we have identified—a demonstrated, long-term commitment and the assumption of mutual care and financial responsibility—increase the likelihood that family relationships will be stable and sustainable and can be relied on to fulfill the important functions of satisfying dependency needs.

### C. *Marriage as an Enduring Family Form*

Although it would seem that other groups that embody the qualities of well-functioning families might qualify for legal recognition and protection, marriage continues to be the sole legal family accorded full legal protection. This section describes the legal attributes of marriage that aspiring families do not (but might wish to) enjoy. It then briefly reviews the critiques of contemporary law by scholars and advocates, many of whom challenge the continued utility of marriage. We conclude that despite its deficiencies, marriage seems likely to retain its protected status; this is so because lawmakers and the public continue to view marriage as a relatively well-functioning family form, a view with some empirical support.

1. *Contemporary Marriage as a Privileged Status.* — Marriage is a relationship defined by legal rights and obligations that do not apply to other families.<sup>47</sup> Marriage confers tangible financial benefits and privileges, including social-security survivor benefits, estate-tax exclusions, and health-insurance benefits for government employees, as well as the opportunity to protect property from creditors.<sup>48</sup> Married couples are also granted rights and privileges based on the presumed closeness of their relationship, such as surrogate decisionmaking authority and inher-

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47. The General Accounting Office famously reported more than one thousand references to marital status in the United States Code, many of which conferred benefits on married couples that other families do not enjoy. See Letter from Barry R. Bedrick, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Henry J. Hyde, Chairman, Comm. on the Judiciary, House of Representatives, Regarding Defense of Marriage Act 1–2 (Jan. 31, 1997), available at <http://www.gao.gov/assets/230/223674.pdf> (on file with the *Columbia Law Review*).

48. Perhaps the most comprehensive accounts have been offered by advocates seeking marriage rights for gay and lesbian couples and by courts holding that the exclusion of same-sex couples from marriage violates the principle of equal protection. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862, 902 n.28 (Iowa 2009) (cataloguing marital rights and privileges under Iowa law); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955–57 (Mass. 2003) (listing same under Massachusetts law); see also Jesse Dukeminier et al., *Property* 391 (8th ed. 2014) (discussing creditor-protection dimensions of property acquired by spouses as tenants by entireties); Nicole C. Berg, Note, *Designated Beneficiary Agreements: A Step in the Right Direction for Unmarried Couples*, 2011 U. Ill. L. Rev. 267, 295–301 (discussing marital benefits).



itance rights.<sup>49</sup> Further, as advocates for LGBT rights have argued, marriage as a legally privileged family form carries intangible value beyond its tangible benefits.<sup>50</sup> Married couples also have legal obligations to one another that are not imposed on members of nonmarital families. By virtue of marital status spouses cannot unilaterally disinherit one another,<sup>51</sup> and under property-distribution laws applied at divorce<sup>52</sup> each spouse has a right to share in earnings and property acquired by the other during the marriage.<sup>53</sup>

To be sure, nonmarital families are not deprived of all legal and constitutional rights.<sup>54</sup> But these groups are disadvantaged as compared to families based on marriage in many ways that can undermine their functioning. Adults in self-identified families can contractually assume financial obligations to one another, but otherwise no familial rights or

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49. See *Goodridge*, 798 N.E.2d at 955–57 (listing rights granted by marriage under Massachusetts law).

50. In states that recognized civil-union status for gay couples (replicating most marital rights), the emphasis shifted from tangible rights to the dignitary harm of exclusion. See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 993–94 (N.D. Cal. 2010) (finding Proposition 8 prohibiting same-sex marriage unconstitutional, despite availability of domestic partnerships), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), vacated and remanded *sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

51. See *Dukeminier et al.*, *supra* note 48, at 407–10 (noting “all common law property states except Georgia have elective-share statutes,” by which “surviving spouse can renounce the [decedent spouse’s] will, if any, and elect to take a statutory share” of decedent spouse’s property).

52. For a discussion of marital-property rights and division on divorce, see generally *Ira Ellman et al.*, *Family Law: Cases, Texts, Problems* 317–50 (5th ed. 2010).

53. Wage-earning spouses may also be subject to a duty to pay alimony. *Id.* at 420. Spouses have a duty to rescue one another under tort law, whereas a nonmarital family member faces no liability for allowing his loved one to starve. See *Collins, Leib & Markel*, *supra* note 42, at 1335 (discussing special liability of parents and spouses for failure to rescue).

54. Most importantly, the parent–child relationship receives substantial legal protection, regardless of the marital status of the parents. See *Wisconsin v. Yoder*, 406 U.S. 205, 235–36 (1972) (finding state cannot apply mandatory-attendance law to Amish children); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (holding parents have constitutionally protected liberty interest to guide children’s education); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (same). The Court has also struck down laws discriminating against children born to unmarried mothers. See *Levy v. Louisiana*, 391 U.S. 68, 70, 72 (1969) (striking down statute prohibiting children born to unmarried mothers from suing under state’s wrongful-death statute). Unmarried parents receive less protection than their married counterparts. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 131–32 (1989) (upholding California statute creating presumption of legitimacy for child born to married mother against child’s biological father seeking access).

Courts, including the Supreme Court, sometimes have accorded legal protections to other nonmarital families. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 503–06 (1977) (finding ordinance definition of family that prohibited grandson from living with grandparent unconstitutional under Due Process Clause); see also *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (holding state law prohibiting unmarried persons from having access to contraceptives violated Fourteenth Amendment).

duties inhere in their relationships.<sup>55</sup> Moreover, these relationships receive little support or recognition from the state; they do not receive social-security spousal benefits, estate-tax advantages, inheritance rights, or (usually) health-insurance benefits.<sup>56</sup> Further, although the parent-child relationship receives substantial legal protection,<sup>57</sup> the relationship *between* unmarried parents does not.<sup>58</sup> The dependent parent has no claim to alimony or a share of her partner's property if the relationship ends, even though these financial awards redound to the benefit of the children. Unmarried parents also have no inheritance rights; children in nonmarital families may have to share a parent's estate with a more distant relative not living in the household.

Scholars and law-reform advocates have sharply criticized the elevated legal status of traditional marriage and argued for legal protection of other family relationships. The LGBT marriage-equality movement has offered the most prominent and successful challenge, of course.<sup>59</sup> But other reformers have argued that a broad range of nonmarital families—including single-parent families, unmarried couples and their children, and adults in nonconjugal relationships—should be accorded legal parity with marriage.<sup>60</sup> Finally, a few scholars have explored the social and legal

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55. *Marvin v. Marvin*, 557 P.2d 106, 116 (Cal. 1976) (holding contracts between cohabitants enforceable).

56. It is not surprising that activists for same-sex couples' relationship rights mobilized in response to the AIDS crisis: The experience of exclusion from family health benefits, medical-proxy decisionmaking authority, and guardianship priority underscored that even long-term, committed gay and lesbian relationships received no legal protection. See *infra* Part III.A.2 (describing collective action motivated by AIDS crisis). Indeed, until recently, these unions were legally prohibited in many states. Cf. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (finding criminal antisodomy statute unconstitutional as violation of same-sex consenting adults' right of privacy).

57. See *supra* note 54 (discussing protection of parent-child relationship). Further, many government programs aim to provide services to children of unmarried parents in poor families. Medicaid, the State Children's Health Insurance Program, and the Work Incentive program are federally funded. Many states also have child-care programs. For a comprehensive discussion of safety-net programs, see generally Currie, *supra* note 40.

58. See Merle H. Weiner, Caregiver Payments and the Obligation to Give Care or Share, 59 Vill. L. Rev. 135, 142–52, 177–212 (2014) (explaining few financial obligations run between unmarried parents to detriment of caregivers and arguing for increasing those obligations for both unmarried and married parents).

59. See generally William N. Eskridge, Jr., The Case for Same-Sex Marriage 62–74 (1996) (arguing marriage access is worth pursuing for same-sex couples); Thomas B. Stoddard, Why Gay People Should Seek the Right to Marry, Out/Look, Fall 1989, at 9 (arguing gay-rights movement should seek full legal recognition for same-sex marriage). But see Katherine M. Franke, Longing for *Loving*, 76 Fordham L. Rev. 2685, 2689 (2008) [hereinafter Franke, Longing] (arguing, after *Lawrence v. Texas*, gays and lesbians should fight to protect unregulated territory for relationships between marriage and criminality, an area endangered by marriage). For a breakdown of state laws, see Nat'l Conference of State Legislatures, *supra* note 32.

60. See Nancy D. Polikoff, Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction, 2004 U. Chi. Legal F. 353, 356, 367 (expressing approval of ALI Principles on this ground). Martha Fineman and Judith

response to polyamory and tackled the challenge of designing a regulatory regime for polygamous relationships.<sup>61</sup>

The contemporary critique has shifted somewhat from the well-established feminist argument that marriage is a hierarchical, patriarchal institution that oppresses women to a broader challenge based on principles of liberty, equity, and equality.<sup>62</sup> Many critics today focus primarily on the deficiencies of marriage<sup>63</sup> and on the harm to nonmarital families of privileging marriage and withholding its benefits from other groups that fulfill family functions.<sup>64</sup> Other scholars argue that the liberal state should support a broad range of family options, allowing individuals to pursue their conception of the good life.<sup>65</sup>

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Stacey argue for the abolition of marriage. See *supra* note 1 (citing reformers who have called for abolition of marriage); see also Law Comm'n of Can., *supra* note 1, at 6–7 (arguing Canada should provide greater recognition of and support for nonmarital relationships).

61. See generally Davis, *supra* note 8, at 1998–2032 (proposing partnership regulatory model); Elizabeth Cannon Leshner, Comment, Protecting Poly: Applying the Fourteenth Amendment to the Nonmonogamous, 22 Tul. J.L. & Sexuality 127, 140–44 (2013) (developing substantive due process argument for legal protection of polyamorous relationships). Elizabeth Emens probes the hostility to polyamorous relationships and describes the nonpathological nature of these relationships. See Emens, *Monogamy's Law*, *supra* note 35, at 287–97, 300–20.

62. Of course, some feminists continue to reject marriage as harmful to women, emphasizing that married women's caretaker-homemaker role often leaves them financially vulnerable upon divorce. See Weiner, *supra* note 58, at 135–37 (discussing financial dangers of marriage and divorce). But see Goldberg, *supra* note 2, at 233–34 (pointing to legal reforms that have created formal gender equality in marriage to challenge argument that marriage by gays would transform the institution).

63. Judith Stacey, for example, derides marriage as a flawed and obsolete institution in an era in which almost half of marriages dissolve and many spouses (mostly husbands on her account) fail to live up to their vows. See Judith Stacey, *Forsaking No Others: Coming to Terms with Family Diversity*, in *Marriage at the Crossroads*, *supra* note 2, at 201, 201–08.

64. See generally Fineman, *Neutered Mother*, *supra* note 1, at 226–30 (arguing marriage is key mechanism through which dependency is privatized in American law); Polikoff, *Beyond Marriage*, *supra* note 1, at 98–109 (arguing “focusing on solutions other than marriage . . . will improve the lives of same-sex couples as well as LGBT people not in coupled relationships, and their children”). Polikoff's book comprehensively argues for protection of all families and documents the harms to nonmarital families under the current regime. See *id.* at 83–109, 123–45. Professor Polikoff argues elsewhere that the legal benefits associated with marriage, such as family health insurance, social-security survivor benefits, and inheritance rights, are just as important to the welfare of unmarried gay and straight couples, siblings, adult children living with elderly parents, and other groups living in long-term relationships. See Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 Hofstra L. Rev. 201, 225–32 (2003) (arguing undue focus on marriage excludes other deserving relationships from important legal protections).

65. See Eskridge, *Family Law Pluralism*, *supra* note 10, at 1898–1901 (arguing for utilitarian approach of guided choice to family formation that supports individual flourishing and value to family members); see also Lifshitz, *supra* note 10, at 1589–95 (arguing for family pluralism as intrinsic value and challenging imposition of mandatory obligations on cohabitants).

A general theme emerges from these critiques: A wide range of diverse families function (at least) as well as different-sex marriage, and the exclusive legal privileging of marriage can no longer be justified. The various critiques accept the social value of *families* but challenge the notion that traditional marriage warrants the special status that it has long enjoyed.<sup>66</sup>

2. *The Durability of Marriage as a Family Form.* — Even though fewer couples choose marriage today,<sup>67</sup> and many contemporary marriages do not embody qualities of stability and mutual care,<sup>68</sup> substantial evidence supports that marriage continues to be widely regarded as a well-functioning family form. Public attitudes toward marriage are positive; most individuals, even in nonmarital families, aspire to marriage.<sup>69</sup> More-

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66. A few scholars have questioned the law's deferential treatment of families. Mary Anne Case, for example, challenges the assumption that employers, employees, and taxpayers should be responsible for substantially subsidizing parents in their role of raising their children. See Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 *Chi-Kent L. Rev.* 1753, 1754–57 (2001). Other scholars have challenged the benefits of family status in the criminal-justice system, criticizing testimonial privilege, sentence reductions, and effective immunity from prosecution for harboring a family member. See, e.g., Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 *U. Ill. L. Rev.* 1147, 1190–1200 (raising this challenge).

67. A 2013 survey reported that for the first time fewer than fifty percent of households are based on marriage. Sabrina Tavernise, *Married Couples Are No Longer a Majority*, *Census Finds*, *N.Y. Times* (May 26, 2011), <http://www.nytimes.com/2011/05/26/us/26marry.html> (on file with the *Columbia Law Review*) (reporting results of survey).

68. The relatively high divorce rate in this country varies substantially on the basis of class; it has declined substantially since the mid-1980s for educated couples but remains high for working-class couples. See June Carbone & Naomi Cahn, *Marriage Markets: How Inequality Is Remaking the American Family* 15–16 (2014) (“[B]y 2004, the divorce rates of college graduates were back down to what they were in 1965 . . . . In the meantime, the divorce rates of the less well educated reached all-time highs.”). Spouses can avoid financial interdependence through separate bank accounts and (in many states) property ownership and premarital agreements. See *infra* note 76 (discussing marital-property ownership in equitable distribution (versus community property) jurisdictions).

69. According to a 2013 Gallup poll, seventy-eight percent of respondents who had never been married wanted to get married. *Marriage*, Gallup, <http://www.gallup.com/poll/117328/marriage.aspx> (on file with the *Columbia Law Review*) (last visited Feb. 4, 2015). When asked why they were not married at the present time, most respondents indicated they had not found the right person, they were too young or not ready, or they were waiting because of financial considerations. *Id.* Social scientists find that marriage has become idealized as a marker of financial and personal success and is viewed as out of reach by many poor and working-class individuals. Kathryn Edin has found that both women and men hold this view. See Kathryn Edin & Timothy J. Nelson, *Doing the Best I Can: Fatherhood in the Inner City* 90–98 (2013) (noting desires of inner-city men to marry only after their lives meet certain conditions); Kathryn Edin & Maria Kefalas, *Promises I Can Keep: Why Poor Women Put Motherhood Before Marriage* 104–37 (2005) (discussing working-class parents who aspire to fulfill unlikely economic and educational goals before marrying). For additional discussion of the idealization of marriage, see Andrew J. Cherlin, *The Growing Diversity of Two-Parent Families: Challenges for Family Law*, *in* *Marriage at the Crossroads*, *supra* note 2, at 290 (“[R]omantically involved couples who do

over, courts and legislatures have often invoked marriage as the template for evaluating the claims of parties in nonmarital family relationships that their affiliations should qualify for legal benefits.<sup>70</sup> It is not surprising perhaps that advocates seeking legal protection for these relationships emphasize their similarity to marriage.<sup>71</sup>

The empirical evidence also indicates that families based on marriage, even today, tend to embody the qualities earlier identified as contributing to satisfactory family functioning. In general, spouses are much more likely to share income and property than are cohabiting couples.<sup>72</sup> Moreover, despite the relatively high divorce rate, marriages tend to be more stable than informal family relationships; that stability translates into advantages for children in educational attainment, social adjust-

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not see the possibility of a strong financial footing are more likely to decide to have a child or accept an unplanned pregnancy than to postpone having children until they have the means to marry.”); McLanahan & Garfinkel, *supra* note 27, at 151 (noting doubts among low-income women regarding ability to maintain stable marriages).

70. For a discussion of the use of marriage as a template for family relationships both by lawmakers and advocates in the marriage-equality movement, see *infra* Part III.A. Courts have also compared relationships to marriage in evaluating whether they qualify as “family” relationships. See *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 53–54 (N.Y. 1989) (describing same-sex relationship with marital traits of duration, commitment, and interdependence as family relationship).

71. The priority assigned by LGBT-rights advocates to attaining marriage rights for same-sex couples suggests the continued importance of marriage. See *infra* Part III.A (discussing marriage-equality movement and advocacy strategy). This priority has been controversial in the gay community. Paula Ettelbrick and Thomas Stoddard famously debated whether marriage should be a key political goal of the gay community. Compare Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *Out/Look*, Fall 1989, at 9, 14 (“[M]aking legal marriage for lesbian and gay couples a priority would set an agenda of gaining rights for a few, but would do nothing to correct the power imbalances between those who are married (whether gay or straight) and those who are not.”), with Stoddard, *supra* note 59, at 10 (“[T]he gay rights movement should aggressively seek full legal recognition for same-sex marriages.”). For additional discussion of the effects of prioritizing marriage rights, see Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 *Colum. J. Gender & L.* 236, 246–48 (2006) [hereinafter Franke, *Marriage Politics*] (challenging efforts to gain marriage equality through arguments that same-sex relationships are marriage-like).

72. See Michael S. Pollard & Kathleen Mullan Harris, *Cohabitation and Marriage Intensity: Consolidation, Intimacy and Commitment* 13 (RAND Labor & Population, Working Paper No. WR-1001, 2013), available at [http://www.rand.org/content/dam/rand/pubs/working\\_papers/WR1000/WR1001/RAND\\_WR1001.pdf](http://www.rand.org/content/dam/rand/pubs/working_papers/WR1000/WR1001/RAND_WR1001.pdf) (on file with the *Columbia Law Review*). These researchers compared marriage and cohabitation, using a large data set of young adults. *Id.* at 1–2. They found that sixty-eight percent of women in marriages had joint checking accounts versus sixteen percent of women in cohabitations. *Id.* at 11. Marital property is shared on divorce unless the spouses affirmatively opt out through premarital agreements, an option chosen by only a small percentage of married couples. Heather Mahar, *Why Are There So Few Prenuptial Agreements?* 1 & n.1 (Harvard John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 436, 2003), available at [http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/436.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/436.pdf) (on file with the *Columbia Law Review*) (describing studies finding 1.5%, 5%, and 5%–10% of marrying couples have prenuptial agreements).



ment, and other measures of well-being.<sup>73</sup> Although many factors contribute to the differences, including substantial selection effects, some of the benefits accruing to marital families inhere simply in the stability of marriage itself.<sup>74</sup>

Scholars have argued that the relative stability of marital families in part is a function of legal and normative influences on the behavior of spouses that support the bond between them. The formal commitment undertaken by couples entering marriage is not casual; it typically involves the ceremonious assumption of mutual obligations.<sup>75</sup> Marriage can be set aside only through the formal legal process of divorce, which even today carries high social and legal costs.<sup>76</sup> But beyond its formal

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73. The recent National Survey of Family Growth found that almost half of those cohabitation unions that do not transition to marriage dissolved within three years. "Forty percent of first premarital cohabitations among women transitioned to marriage by 3 years, 32% remained intact, and 27% dissolved." Casey E. Copen, Kimberly Daniels & William D. Mosher, Nat'l Ctr. for Health Statistics, Ctrs. for Disease Control and Prevention, National Health Statistics Reports No. 64, First Premarital Cohabitation in the United States: 2006–2010 National Survey of Family Growth 5 (2013), available at <http://www.cdc.gov/nchs/data/nhsr/nhsr064.pdf> (on file with the *Columbia Law Review*). Pollard and Harris found substantially lower levels of commitment between cohabitants than between spouses. Pollard & Harris, *supra* note 72, at 12–13.

Sara McLanahan and her colleagues, in their longitudinal Fragile Families and Child Well Being Study, have found that the relationships of unmarried parents are less stable than those of married parents; nearly two-thirds of unmarried parents' relationships have dissolved by their children's fifth birthday. See McLanahan & Garfinkel, *supra* note 27, at 149–52; see also *supra* note 27 (discussing study).

74. More highly educated and wealthier couples marry at far higher rates than poorer, less educated couples, and many of the differences in outcomes can be attributed to this selection effect. See Carbone & Cahn, *supra* note 68, at 2–4 (explaining correlation between socioeconomic status, marriage rates, and partner selection). But not all differences are due to selection effects. See Robert E. Emery, Erin E. Horn & Christopher R. Beam, Marriage and Improved Well-Being: Using Twins to Parse the Correlation, Asking How Marriage Helps, and Wondering Why More People Don't Buy a Bargain, *in* Marriage at the Crossroads, *supra* note 2, at 126, 134 (using twin study to confirm marital benefits); see also Deborah Carr & Kristen W. Springer, Advances in Families and Health Research in the 21st Century, 72 J. Marriage & Fam. 743, 748–52 (2010) (reviewing research showing marital benefits on health). This does not mean, of course, that coercing unmarried couples to marry would produce stability.

75. For a discussion of the role of wedding ceremonies and traditions such as wedding rings in reinforcing marital commitment, see Elizabeth S. Scott, Social Norms and the Legal Regulation of Marriage, 86 Va. L. Rev. 1901, 1916–23 & nn.34–35 (2000) [hereinafter Scott, Social Norms]; see also Elizabeth S. Scott, A World Without Marriage, 41 Fam. L.Q. 537, 562–66 (2007) (arguing "ceremonies and traditions that surround marriage and . . . the intricate web of social norms regulating spousal behavior contribute to the stability of marriage").

76. Economists Shelly Lundberg and Robert Pollak argue that the high cost of divorce, including the internalized sense of personal failure, defines marriage as a relationship of intertemporal commitment and is a key distinction between marriage and cohabitation. Shelly Lundberg & Robert A. Pollak, Cohabitation and the Uneven Retreat from Marriage in the U.S., 1950–2010, at 14 (Nat'l Bureau of Econ. Research, Working Paper No. 19413, 2013), available at <http://www.nber.org/papers/w19413> (on file with



legal structure, marriage is embedded in informal social norms that prescribe expectations for spousal behavior and underscore its nature as a family relationship defined by long-term commitment. These norms are internalized, thereby reinforcing trust, and are also enforced externally through informal sanctions.<sup>77</sup> Although the norms regulating marriage function imperfectly in contemporary society,<sup>78</sup> they tend to support marital commitment by guiding spouses' behavior in ways that strengthen relationships and deter behavior that may have a destabilizing effect on the relationship.

In sum, marriage occupies a secure status as a legally recognized family with broad public support. Moreover, although marriage has become both less common and less stable in modern times, the weight of the evidence is that marriage as a category continues to fulfill relatively well the functions that justify its protected legal status.

#### D. *Extending State Benefits to Other Families*

The fact that the law confers deference and societal resources on marriage does not mean that the privileged status of this traditional family form should be *exclusive*. In a liberal society, fundamental principles of autonomy support a state policy that promotes pluralism and provides opportunities for individuals to form family relationships that bring happiness and satisfy their needs.<sup>79</sup> Moreover, the current social climate makes such a pluralist approach feasible. But while autonomy values argue for expanding choice beyond traditional legal boundaries, social-welfare concerns predictably will be invoked to justify restricting family status to those relationships that are likely to fulfill the legitimate state interest in reliably satisfying dependency needs. Legal privileging of fami-

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the *Columbia Law Review*). On their view, this commitment facilitates a long-term investment in children, a goal that motivates contemporary marriage. *Id.* at 28–29.

Upon dissolution, the financial obligations undertaken by the spouses usually are legally enforceable. See Elizabeth S. Scott & Robert E. Scott, Marriage as Relational Contract, 84 Va. L. Rev. 1225, 1308–09 (1998) [hereinafter Scott & Scott, Relational Contract] (describing property distribution on divorce). In community-property states, property and income acquired during marriage are community property. In other states, marital property is subject to equitable distribution on divorce, unless the couple opts out through a prenuptial agreement. See *supra* note 72 (discussing small portion of couples executing prenuptial agreements). For a discussion of property distribution on divorce, see Ellman et al., *supra* note 52, at 317–80.

77. See Scott, Social Norms, *supra* note 75, at 1920–23, 1960–66 (arguing traditional marriage was regulated by commitment norms and gender norms, which became bundled, contributing to contemporary criticism of marriage). The couple's community sanctions violations through gossip and other expressions of disapproval. *Id.* at 1921 n.45.

78. See *id.* at 1940 (providing examples of when marital norms have failed). This is so for two reasons: First, the norms themselves are weaker, and, second, the greater anonymity and mobility of urban society dilutes their effectiveness.

79. A pluralist approach allows individuals to pursue their own conceptions of the good life, which for many people surely includes living in families that satisfy physical and emotional needs. See *supra* note 10 (citing articles arguing for pluralist approach).

lies absorbs resources that are not available for other social purposes: Estate taxes not paid by surviving spouses, for example, are lost to the federal treasury. Nonetheless, this allocation of resources is justified when an aspiring family group fulfills the socially valuable functions identified above, thereby relieving the state of part of its collective obligation to care for dependency. In sum, while not all claimants warrant special family status, groups that care adequately for members' dependency needs and have the qualities of commitment, durability, and emotional and financial interdependence deserve legal recognition and support.

On occasion, lawmakers have acknowledged this point. Legal benefits are sometimes extended to adult *de facto* relationships on the basis of their similarity to marriage.<sup>80</sup> Courts have also recognized *de facto* parent-child relationships in situations in which an adult has functioned in a parental role for an extended period in a family setting.<sup>81</sup> But despite general public tolerance of a diverse range of families, the success of gays and lesbians in gaining access to marriage represents the only discernible trend toward elevating the legal status of a category of nontraditional families.

This presents a puzzle. In a society in which the public accepts family diversity and acknowledges the importance of families to individual and collective welfare, what explains the legal inertia? Are there particular conditions that impede legal recognition of nonmarital families? The answers to these questions can shed light on why some nonmarital families have failed to obtain legal protection despite more tolerant social attitudes.

## II. A COLLABORATIVE MODEL OF THE EVOLUTION OF NOVEL FAMILY FORMS

This Part seeks to explain the legal inertia and to specify a process by which aspiring family groups might attain their goal. We develop an informal model that describes a multistage collaborative process by

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80. Courts assessing whether some nonmarital couples deserve recognition as "families" have evaluated their relationships against a metric of marital-family behavior and attributes—pointing to their durability, history of financial interdependence, care during illness, and intimate companionship. See *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 54–55 (N.Y. 1989) (holding couple could qualify as "family" under rent-control ordinance based on marriage-like relationship); see also *Connell v. Francisco*, 898 P.2d 831, 836–37 (Wash. 1995) (upholding equitable distribution of property between cohabitants on basis of marriage-like quality of relationship); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 *Calif. L. Rev.* 87, 113 (2014) (explaining advocates for domestic-partnership rights in California in 1990s argued gay unions were marriage-like).

81. Many cases involve lesbian *de facto* parents living with the child and legal (usually birth) mother. Courts have allowed visitation rights when a petitioner can show she functioned as a parent with the agreement of the legal parent for an extended period of time. See, e.g., *V.C. v. M.J.B.*, 748 A.2d 539, 548 (N.J. 2000) (holding *de facto* parent had standing to seek visitation). When the gay couple marries, the spouse becomes the legal parent to children born to the marriage.

which novel family forms can achieve legal status as families. The analysis begins with the premise that the state appropriately grants legal privileges and benefits to families because these groups supply important social goods for which the state would otherwise be responsible.<sup>82</sup> Part II.A shows that, owing to the effects of uncertainty about whether novel family groups satisfy this criterion, the parties face challenging conditions that impede their progress toward gaining legal recognition as families. In Part II.B, the uncertainty is resolved in the model through three stages of an integrated process, each of which is defined by a form of collaboration. Collaborative engagement in the development of novel commercial relationships provides exemplars of how these impediments have been overcome in other contexts. This analysis illuminates the mechanisms parties use to make credible commitments to each other, signal those commitments to others, and engage with the state in verifying their compliance with established norms.

A. *Conditions Impeding the Legal Recognition of Novel Family Relationships*

Consider a group composed of two men and two women who have developed close emotional and sexually intimate relationships with one another and wish to live together as a single family bound by a long-term commitment to mutual support, interdependency, and equality.<sup>83</sup> The group plans to pool earnings and property, and to have children and care for them collectively. Will this group face conditions that impede their efforts to secure the rights and obligations currently bestowed on marital families? This thought experiment yields the prediction that an aspiring polygamous family<sup>84</sup> will confront three significant obstacles on the path to legal recognition.

The first challenge this group faces is relational uncertainty or novelty: Family relationships such as these are experimental, and even close emotional bonds are not predictive of whether the group will function well as a family. Lacking models of similar relationships that have succeeded in forming families, the individual members of the polygamous

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82. This Article does not challenge that marital privilege may have historically had other justifications, but rather it assumes that, in contemporary society, the legitimacy of marital privilege is based on its social utility as a family form.

83. The commitment of our hypothetical polygamous family to formal equality, mutual support, and loyalty distinguishes this aspiring family from other polygamous groups, such as fundamentalist Mormons, that are organized hierarchically around a single dominant male figure. See Davis, *supra* note 8, at 1966 (observing polygamy is “overwhelmingly between a single husband married to multiple wives” and “male dominance is a characteristic of polyandrous societies as well” (internal quotation marks omitted)).

84. Polygamy is defined as plural marriage with multiple spouses regardless of the gender combination; polygyny is the familiar form of one man and multiple wives. See Emens, *Monogamy’s Law*, *supra* note 35, at 300–03 (clarifying terms). Our group aspires to legal recognition of plural (or polygamous) marriage. Polyamorous relationships do not imply commitment, a quality of family relationships as we have defined them. See *id.* at 303–09 (describing fluidity of term “polyamorous”). Thus our family is “polygamous.”

family will be unsure whether their affiliation will be durable and whether the trust and confidence that support long-term commitment will develop. A second difficulty inheres in the fact that novelty also implies idiosyncrasy. In the initial stage, there are few other polygamous families with similar aspirations with whom to share experiences. Thus, even if they can develop the means to create the necessary trust in each other's capabilities, a polygamous family may be socially isolated, lacking a community of similar aspiring families. The nature of their relationship will also be unfamiliar to the public, which may view this novel family with suspicion—and perhaps hostility.<sup>85</sup> This isolation quite obviously creates a daunting obstacle to recognition at the level of practical politics,<sup>86</sup> but it also means that aspiring polygamous families are not (or are only weakly) integrated into the larger normative community that defines expectations for family behavior.

A final problem stems from the need to persuade the state to extend legal recognition to polygamous families as a recognized family form in exchange for their readiness to assume family responsibilities. The state faces a serious information deficit in evaluating whether this new category of family has the qualities that justify special legal treatment. This is because family functioning is largely private, and the durability and adequacy of the novel group may be hard to assess. Thus, state actors face informational barriers in sorting groups deserving of family status from other groups that may seek the privileges and resources allocated to families but fail to create the welfare benefits the state requires.<sup>87</sup> The discussion that follows argues that in combination these conditions impose significant obstacles to efforts by a hypothetical polygamous family to secure legal-family status.

1. *The Problem of Relational Novelty.* — To some extent, the problem of novelty is almost universal when adults form family relationships. Individuals must establish trust in each other's character and have confi-

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85. The public reaction to polyamorous groups is very likely to be hostile. See Newport & Himelfarb, *supra* note 35 (finding eighty-three percent of respondents found polygamy to be morally wrong). Other novel families, such as voluntary kin, may face skepticism but less animus. See *infra* Part III.C (discussing other nondyadic families).

86. We argue in Part II.B.3 that the formation of interest-group networks is likely to be an important means of pursuing the goal of legal recognition.

87. A legal status (such as marriage) that grants benefits and privileges carries a moral-hazard risk. Cf. Kerry Abrams, *Marriage Fraud*, 100 Calif. L. Rev. 1, 14–39 (2012) (describing government strategies to prevent fraudulent claims to various marriage benefits). The risk will likely be (and has been) a concern when novel families seek recognition. For example, when advocates sought domestic-partnership status for gay couples in California in the 1990s, insurance companies insisted the status be defined so that only marriage-like couples qualified. See Nejaime, *supra* note 80, at 115 (explaining insurance carriers “resisted adding domestic partnership coverage without assurances that this new relationship status would be characterized by a marriage-like level of commitment”). The companies feared that individuals with AIDS would register with sympathetic friends, thereby qualifying for health insurance. *Id.* at 141.

dence in their respective abilities before they can make credible commitments to undertake the demanding roles required. Although some people report having a love-at-first-sight experience when they met their future life partners, more typically the process of finding satisfactory and lasting family relationships is one of experimentation and adjustment. Commitment is usually tentative when relationships are new, and it grows over time unless or until one or both of the parties realizes that the relationship is unsuccessful. Moreover, the parties may differ in their intentions and investment in the union. Each hopes that the prospective partner will be a trustworthy and competent caretaker and that emotional attachments will mature and endure. But only through experience can parties evaluate accurately whether their relationships embody the qualities that define successful families.<sup>88</sup>

The level of uncertainty is significantly greater when individuals, such as those forming a polygamous family, experiment with novel family forms. Aspiring families are by nature experimental: The parties lack exemplars to guide them in family behavior and must adapt and adjust their roles and interactions over time as they seek to fulfill family functions in uncharted settings.<sup>89</sup> Some forms may work better than others to satisfy dependency needs reliably. The individuals forming a polygamous family, for example, will be uncertain whether multiple adults in a conjugal group will function effectively to care for one another and their children in stable, committed relationships. Increasing the number of adults beyond a partnership of two individuals adds complexity to the relationship; with complexity may come a greater potential for exploitation, conflict, or alliances within the group—all of which might contribute to instability.<sup>90</sup> Even if these risks are never realized, the evidence of whether a novel family form is viable can only be acquired through extended experience. Only when the heightened level of uncertainty is substantially resolved can the parties determine that their polygamous family has the caring qualities and the enduring character that the social-welfare criterion requires.

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88. The evidence that, for women, almost half of first premarital cohabitations transition to marriage in three years, Copen, Daniels & Mosher, *supra* note 73, at 5, suggests that many relationships go through the kind of experimentation we describe.

89. For example, committed polygamous families cannot model their relationships on marriage. But because they are dedicated to formal equality among all adult members, they would not receive substantial normative support from those polygamist groups, such as fundamentalist Mormons, that function as male-dominated hierarchies.

90. Fundamentalist Mormon groups may maintain stability through a rigid hierarchical structure, see *infra* note 290 and accompanying text (describing this structure), which this Article rejects as unacceptable in a modern family. Adrienne Davis identifies these challenges and argues they can largely be resolved through partnership regulation. See Davis, *supra* note 8, at 2002–17 (arguing commercial-partnership law addresses challenges caused by plural marriage, including those related to formation, entrance, exit, dissolution, and property rights).



2. *Social Isolation: The Absence of Associational Bonds and Public Acceptance.* — Even if the adult members of a polygamous family gain confidence and trust in one another as a functioning family, other challenges remain. In the early period of its evolution, the isolated novel family typically lacks a community of similar families; this creates two problems. First, the polygamous family must rely solely on its own members' commitment and resources for success. The absence of a broader social group leaves the polygamous family without the benefit of friends and neighbors who offer support and enforce behavioral norms,<sup>91</sup> important sources of stability for marital families. Moreover, even as their numbers increase, success in the political arena is unlikely unless polygamous families affiliate and form an interest group (or groups) dedicated to achieving their shared political goal of attaining legal recognition. Without such coordination, polygamous families might fulfill family functions well, but they would still be likely to retain their outsider status. In short, the novel family faces the challenge of overcoming isolation and creating a network of families capable of developing group norms and mobilizing political action to gain support for the group's legal recognition.<sup>92</sup>

Successful mobilization poses daunting challenges for novel families.<sup>93</sup> Due to polygamous families' separation from society, the public initially may be unaware of the group's existence and later may find their family relationships to be strange and unfamiliar. Public awareness is a necessary (but not sufficient) condition for legal recognition. But even in an era of more tolerant public attitudes, growing public awareness may engender skepticism or hostility based on assumptions that polygamous families will not function adequately as families, that they may harm

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91. As we discuss below, the creation of a network of aspiring families may be a key intermediate step in a norm-formation process between a period in which small numbers of families function in isolation and one in which the novel family group attains some level of public acceptance. See *infra* Part II.B.3.

92. Our description of this process is stylized, and real isolation likely exists only in the earliest stage. See Verta Taylor & Nancy E. Whittier, *Collective Identity in Social Movement Communities: Lesbian Feminist Mobilization*, in *Frontiers in Social Movement Theory* 104, 109–21 (Aldon D. Morris & Carol McClurg Mueller eds., 1992) (“[T]he purposeful and expressive disclosure to others of one’s subjective feelings, desires, and experiences—or social identity—for the purpose of gaining recognition and influence is collective action.”).

93. A substantial literature focuses on the role of social movements in advancing legal and constitutional reforms. Some scholars have analyzed the mobilization and impact of identity-based social movements. See, e.g., Lani Guinier & Gerald Torres, *The Miner’s Canary: Enlisting Race, Resisting Power, Transforming Democracy* 74–82 (3d ed. 2003) (discussing mobilization of racial groups); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. Pa. L. Rev. 419, 447–48, 456–57 (2001) [hereinafter *Eskridge, Channeling*] (describing mobilization of gay-rights movement). For a discussion of social mobilization to attain family rights, see *infra* notes 149–152 and accompanying text.



dependent members, or that they are engaging in immoral behavior.<sup>94</sup> Thus, the aspiring family category faces the challenge of demonstrating to the larger community that they are faithfully performing family roles—a difficult task given that families function largely in the private sphere. Further, the anticipation of a hostile public response may inhibit the inclination of these families to publicize their family relationships.<sup>95</sup> But if they are “closeted,” polygamous families will find it more difficult to gain public acceptance as well-functioning families.

Public ignorance or skepticism about the qualities of an aspiring family category undermines the prospect of legal recognition.<sup>96</sup> Although the relationship between public attitudes and legal reform in the realm of civil rights is complex,<sup>97</sup> some level of public tolerance and receptiveness is (and has been) a predicate to the willingness of political actors and courts to confer new family rights.<sup>98</sup> Moreover, a community of

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94. The testimony in the congressional hearings for the Defense of Marriage Act in 1995 was replete with allegations that gay relationships were immoral, promiscuous, and harmful to children. See, e.g., 142 Cong. Rec. 17,070 (1996) (statement of Rep. Barr) (“The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit.”). Today, polygamous families face a similar response. See *infra* Part III.C.1 (describing challenges polygamous families confront in achieving recognition given traditionally skeptical attitudes to their family structure).

95. Part III.A describes how gay couples living in family relationships faced not only public animus but also criminal sanctions and loss of employment, which not surprisingly led many to remain closeted. Most observers agree that the AIDS crisis and the lesbian baby boom were critically important in leading many gay couples to live openly and form networks in pursuit of the goal of legal protection of their family relationships. See *infra* notes 214–230 and accompanying text (describing nature and impact of both phenomena). This in turn led to public familiarity. See *infra* notes 235–238 and accompanying text (discussing transformation of public attitudes towards same-sex relationships resulting from gay community’s political and social collaboration).

96. For discussion of the relationship between public familiarity and acceptance in the marriage-equality movement, see Part III.A; see also Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* 196–202 (2013) [hereinafter Klarman, *Closet to Altar*] (discussing relationship between changing public attitudes and legal reform).

97. Michael Klarman has studied the relationship between public opinion and constitutional reform in other contexts. See Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 344–442 (2004) [hereinafter Klarman, *Jim Crow*] (discussing public backlash to *Brown v. Board of Education*).

98. This does not mean that general acceptance is required. The early judicial opinions conferring marriage rights on gays and lesbians were criticized and not generally popular. See Klarman, *Closet to Altar*, *supra* note 96, at 166–69 (providing example of public and political backlash following *Goodridge*). In response to public criticism, the Massachusetts legislature moved to amend the state constitution post-*Goodridge*, but it reconsidered a year later. Roderick L. Ireland, In *Goodridge’s* Wake: Reflections on the Political, Public, and Personal Repercussions of the Massachusetts Same-Sex Marriage Cases, 85 N.Y.U. L. Rev. 1417, 1423 & n.25 (2010). However, it seems likely that the public was more receptive to recognizing the rights of gays and lesbians in the early twenty-first century than it would have been a generation earlier, when the possibility of legal mar-

polygamous families that is separated from the larger society largely lacks the benefit of the normative framework regulating family behavior that generally stabilizes and supports those families that already enjoy social recognition.<sup>99</sup>

3. *The Verifiability Problem.* — Even after polygamous families develop the trust and confidence to sustain their mutual commitments and affiliate with similar families in pursuit of public acceptance and legal recognition, the state confronts a severe information problem in verifying the petitioning groups' family functioning. Predictably, not all relationships will qualify for the legal subsidy that is conferred on traditional families, and even groups that have attained social acceptance may have a relational form that imposes latent risks on vulnerable members. The state has an independent interest in determining whether novel family categories seeking recognition function safely and successfully for all family members, an interest that may require a greater depth of knowledge than is needed to attain public acceptance.<sup>100</sup> Accurate information is particularly important because legal recognition, once conferred, may be difficult to withdraw. But the inherent privacy of family functioning poses a classic information problem: State actors making decisions about conferring family status may have difficulty discerning whether polygamous families as a category fulfill the functions and possess the qualities that make family relationships socially valuable.<sup>101</sup> Many of the tangible qualities that characterize successful family groups, such as financial interdependence and mutual care, involve behaviors that are

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riage between same-sex partners would have seemed fanciful to most people. See *infra* Part III.A (tracing same-sex relationships' evolution from outsider status to full integration and legal recognition).

99. See Scott & Scott, *Relational Contract*, *supra* note 76, at 1288–93 (describing role of informal social norms in enforcing terms of marriage contract and promoting cooperation and stability in intact marriage). There are clearly exceptions to the idea that a family group must integrate into the larger society to enjoy the benefits of a normative framework. The Amish live separately from the larger society in a community regulated by robust social norms. See Steven V. Mazie, *Consenting Adults? Amish Rumspringa and the Quandary of Exit in Liberalism*, 3 *Persp. on Pol.* 745, 748–49 (2005) (describing strict lifestyle norms among Amish communities). But the basic norms that regulate Amish family behavior are modeled on those that regulate marriage generally. See Julia A. Ericksen et al., *Fertility Patterns and Trends Among the Old Order Amish*, 33 *Population Stud.* 255, 256 (1979) (describing Amish marriages as “monogamous” and “in the Anabaptist-Christian tradition”).

100. See *infra* text accompanying notes 170–173 (discussing fraud and jeopardizing dependent members as potential risks in polygamous families).

101. The problem of verifiability by third-party decisionmakers has been of great interest to contracts scholars. The problem arises when courts must evaluate contract performance that cannot be specifically described. See Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 *Yale L.J.* 814, 825 (2006) (“Contract theorists identify verification costs as one of the principal obstacles to complete contracts.”); see also Oliver Hart, *Firms, Contracts, and Financial Structure* 35–38 & n.15 (1995) (discussing problems of verifying quality of book in royalties contract as example of “verifiability” problem).

not readily observable to third parties. Moreover, intangible qualities that define families, such as long-term commitment, loyalty, and equality, are difficult to evaluate in the absence of express promises or reliable proxies. Thus, distinguishing well-functioning family categories from exploitative or less stable affiliations poses a challenge for state actors, who may have difficulty getting reliable evidence about the nature of claimants' relationships.

B. *The Evolution Toward Legal Recognition Through Collaboration*

1. *The Elements of Collaborative Behavior.* — Our social-welfare premise implies that the state will limit legal recognition to those categories of aspiring families that can overcome the impediments caused by relational novelty, social isolation, and nonverifiability. While the possible means of coping with these conditions are overlapping and interrelated, for analytical purposes they can be separated into three highly stylized evolutionary stages: (1) individuals (exemplars of the novel family type) form and successfully maintain families, (2) the individual exemplars form associational bonds that foster durable group norms and enable the collective to pursue the acceptance and support of the community at large, and (3) the state acquires the information about the particular context in which a novel family type functions to certify its entitlement to legal-family status.

Our model uses exemplars from commercial contexts to show how each of the uncertainties that impede the recognition of novel family forms can be resolved by processes that we loosely describe as *collaboration*. Collaboration refers to a set of behaviors designed to pursue a common objective that can only be achieved through the combined efforts of more than one party when the prospect of success cannot be determined until after each party makes investments in the relationship. Parties who collaborate commit to sharing private information, adjusting iteratively to the new information acquired from others, and relying on informal norms as the means of motivating each party to invest in the relationship.<sup>102</sup> This technique builds trust in each party's commitment to cooperate in pursuing substantive goals as well as confidence in the ability of the other(s) to perform their undertakings competently.<sup>103</sup>

Aspiring families, such as our polygamous family, can use collaborative techniques to respond to each of the three challenging conditions that we have identified. At the first stage, joint collaborations between (or among) individuals aspiring to form polygamous families build the trust

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102. Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration, 109 Colum. L. Rev. 431, 446–48 (2009) [hereinafter Gilson, Sabel & Scott, Contracting for Innovation]; Charles F. Sabel, A Real-Time Revolution in Routines, in *The Firm as a Collaborative Community* 106, 110–13 (Charles Heckscher & Paul S. Adler eds., 2006).

103. Gilson, Sabel & Scott, Braiding, *supra* note 14, at 1402–04.

and confidence needed to overcome the unique uncertainty caused by relational novelty. Collaborative agreements interweave formal commitments with informal norms in ways that respond to the uncertainty inherent in the process of experimentation. At the second stage, collaboration enables isolated polygamous families to overcome collective-action problems and associate with other similar families in developing group norms and forming networks in pursuit of their goals of public acceptance. Finally, at the third stage, collaboration between an aspiring category and the state facilitates joint action to mitigate the risk of harms that otherwise may impede certification of the family class. At each of these evolutionary stages, the key collaborative behaviors of information sharing, iterative adjustment, and informal enforcement are common elements.

The discussion that follows shows how collaboration in the world of commercial contracting has facilitated effective responses to the conditions of relational novelty, social isolation, and nonverifiability. These analogies contribute to an extended example of how a novel family form can evolve from individual aspiring families that successfully develop mechanisms to ensure mutual care and support for their members, to an associational network that signals its identity with the larger normative community, and finally to a legally recognized group through verification and certification by the state that members of the successful group are able reliably to fulfill family functions.

2. *Collaborative Contracting as a Means of Coping with Uncertainty.* — We begin with this question: How can a polygamous family (of two men and two women) form a durable family without prior experience with one another or with the family form, and without normative guidance tailored to the form?<sup>104</sup> The parties understand the functions of families and have general goals for their affiliation. But because of the novelty of their relationship and the dearth of similar family exemplars, the prospect of a durable commitment for ongoing support, care, and nurture is highly uncertain. At the outset, none of the aspiring family members knows whether making an enduring commitment is the best means of pursuing his or her best interests. For this reason, the parties cannot specify with any confidence a set of defined obligations that will achieve their goals for the relationship. In short, at the outset there is not only uncertainty about whether particular individuals can form these durable commitments but also uncertainty over whether the form itself is one in which the functions of families are fulfilled satisfactorily.

a. *A Commercial Analogue: Collaborative Contracting in an Uncertain World.* — An analogue exists in the commercial realm to this vexing prob-

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104. Recall that our hypothetical polygamous family is committed to loyalty and equality among all adult members. Thus, this aspiring family cannot use hierarchical, male-dominated polygamous groups as a template for their relationship. See *supra* notes 83–84 and accompanying text (introducing key assumptions describing this Article’s hypothetical polygamous family).

lem of relational uncertainty. Because of the increasing pace of technological development in the contemporary global environment, commercial actors sometimes need to find partners to share capabilities in pursuing a project that can only be defined and ultimately developed through their joint efforts.<sup>105</sup> Traditional modes of contracting often offer no solution to the contracting problems these parties confront. Facing these conditions of relational uncertainty, commercial actors innovate, searching for partners capable and willing to engage in ongoing collaborations.<sup>106</sup> These innovative “collaborative agreements” have become an essential part of doing business in the contemporary commercial environment.<sup>107</sup>

In a number of industries characterized by rapid technological development, conditions of high uncertainty have led to collaborations where both parties’ skills and commitment to cooperate are necessary to achieve success.<sup>108</sup> In settings as diverse as the pharmaceutical industry and manufacturing supply chains, parties have come to realize that the feasibility of many projects can only be determined by joint investment in the production of information to evaluate whether a project is profitable to pursue.<sup>109</sup> An example is the research collaboration between a large pharmaceutical company with expertise in bringing new drugs to market and a smaller biotech firm with innovative technology. The collaborative agreement aims to explore the feasibility of jointly discovering and developing a novel pharmaceutical product.<sup>110</sup> The common feature of these regimes is a commitment to joint exploration: The contract regulates only the commitment to collaborate and not the course or the out-

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105. See Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. Econ. Literature 629, 649 (2007) (suggesting hold-up problem “clearly pose[s] problems for long-term contracting, and those problems are exacerbated in volatile environments”).

106. For discussion of the legal mechanisms that support the search for partners capable and willing to engage in a collaboration, see Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 Harv. L. Rev. 661, 676–80 (2007).

107. The development of and increase in the use of this new form of commercial contracting is documented in Gilson, Sabel & Scott, *Contracting for Innovation*, supra note 102, at 472–89.

108. In previous work, one of us has identified what is loosely called “the information revolution” as the exogenous shock that marked the emergence of collaborative contracting. Id. at 441–42.

109. These types of collaborative arrangements sometimes take the form of preliminary agreements or “letters of intent.” For discussion of the range of preliminary agreements, see Ralph B. Lake & Ugo Draetta, *Letters of Intent and Other Precontractual Documents* 10–18 (2d ed. 2006). For a discussion of preliminary agreements as a form of collaborative contracting, see Gilson, Sabel & Scott, *Braiding*, supra note 14, at 1439–44.

110. See, e.g., *Research, Development and License Agreement Between Warner-Lambert Co. and Ligand Pharm. Inc.* 2 (Sept. 1, 1999) [hereinafter *Warner-Lambert/Ligand Agreement*], available at <http://print.onecle.com/contracts/ligand/warner.rd.1999.09.01.shtml> (on file with the *Columbia Law Review*) (detailing pharmaceutical research and development collaboration between “big pharma” and “little pharma”).



come of the collaboration, which is entirely unspecified. That means any effort to enforce this agreement in court is limited to protecting each party's promised investment in the collaborative process rather than directing a division of any surplus that might result if the collaboration succeeds.<sup>111</sup> Thus, neither party has a right to demand the performance that the parties imagine may result from a successful collaboration. If the parties cannot ultimately agree on a final objective, they may abandon the collaboration.<sup>112</sup>

b. *Key Elements of Collaborative Agreements.* — The ability of any party to exit the collaboration raises a central question: What knits the collaborators' efforts together? After all, unless the parties can make credible commitments to invest in the relationship, the project will never get off the ground. Studies of these commercial collaborations provide answers to this key question.<sup>113</sup> In brief, the collaboration rests on a governance structure that, over time, creates confidence in the capabilities and trust in the character of the counterparty. Trust and confidence are extremely valuable commodities: Not only do they motivate each party to invest in the relationship, but they also make the prospect of abandoning the relationship in order to collaborate with others much less attractive.<sup>114</sup>

The governance of these commercial collaborations shares several common elements. The first element is a commitment to an ongoing mutual exchange of private information designed to determine if a project is feasible and, if so, how best to implement the parties' joint objectives. The second component is a procedure for resolving disputes. Its key feature is a requirement that the collaborators reach unanimous agreement on crucial decisions, with persistent disagreement resolved by

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111. See, e.g., *Eli Lilly & Co. v. Emisphere Techs., Inc.*, 408 F. Supp. 2d 668, 696–97 (S.D. Ind. 2006) (holding remedy for breach of parties' research agreement is limited to right to terminate and retain accrued scientific information).

112. See Gilson, *Sabel & Scott*, *Contracting for Innovation*, *supra* note 102, at 455–56 (noting when uncertainty arises in performance of collaborative contract, parties may safely abandon); see also Gilson, *Sabel & Scott*, *Braiding*, *supra* note 14, at 1422 (“A refusal to proceed further if a party determines that a project has negative present value should not be grounds for declaring the contract in breach.”).

113. See Gilson, *Sabel & Scott*, *Braiding*, *supra* note 14, at 1405–15 (offering examples of collaborative contract and describing operation of such contracts and relative shortcomings of traditional contracts); see also Iva Bozovic & Gillian K. Hadfield, *Scaffolding: Using Formal Contracts to Build Informal Relations in Support of Innovation* 7–10 (Univ. of S. Cal., Law & Econ. Research Paper No. C12-3, 2012), available at <http://ssrn.com/abstract=1984915> (on file with the *Columbia Law Review*) (finding empirical support for institutional structure of collaborative contracting in study conducted through interviews with group of innovative firms).

114. See Gilson, *Sabel & Scott*, *Contracting for Innovation*, *supra* note 102, at 481–84 (noting costs of working with new collaborator, identified as “switching costs,” increase over duration of existing collaboration).



unanimous agreement at higher levels of management from each firm.<sup>115</sup> Together, these two mechanisms make each party's character traits and substantive capabilities observable and forestall misunderstandings. Working under conditions of uncertainty, the parties can expect to encounter unanticipated problems that can only be solved jointly and that may generate occasions of disagreement. Their increasing knowledge of each other's capacities and their willingness to share private information in service of their collective goals facilitate the resolution of problems and constrain opportunistic behavior.<sup>116</sup>

This arrangement is distinctively limited in its goals, functioning only to allow the parties to learn about each other's skills and capabilities for collaborative innovation and to develop jointly the routines necessary to pursue a desired objective. But, importantly, the collaborative agreement does not commit either party to develop, supply, or purchase any product or service. Rather, the object is to discover two things about the counterparty: How well does the counterparty cooperate, and how capable are they at working jointly toward the ultimate goal? In this way, the governance structure provides the environment in which trust and confidence can grow: In effect, collaborative contracting endogenizes trust by formalizing a process that builds parties' confidence in one another and thereafter supports investments in their joint objectives based on the trust created. The evidence indicates that, if the collaborative process is successful, the uncertainties that existed at the outset of their dealings are resolved through accrued experience, giving rise to traditional contractual statements of obligation and remedy.<sup>117</sup>

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115. See, for example, the Warner-Lambert/Ligand Agreement, *supra* note 110, §§ 3.1.4, 3.2, which provides that all decisions are by unanimous vote and disagreements are resolved by the CEO of Ligand and the President of Warner-Lambert's Pharmaceutical Research Division (or their designees). Requiring unanimity for project decisions makes it easy for reasonable skeptics to require more information from enthusiasts; bumping disagreements up to impatient superiors discourages obstinacy. See Gilson, Sabel & Scott, Contracting for Innovation, *supra* note 102, at 479–81 (describing “contract referee” mechanism” and detailing advantages).

116. The information regime characteristic of these collaborative agreements is designed to make it easy for each party to request clarification from the other. Thus, the regime allows for the joint interpretation of ambiguity and makes observable to the parties actions that would be opaque in an unstructured, informal exchange. This heightened, mutual observability allows the parties to learn about their respective capabilities as well as their disposition to cooperate. Under these conditions, continuing cooperation builds trust and protects each party's reliance on that trust in its substantive performance by increasing the costs of finding an alternative partner capable of reliably doing, and learning, as much as the current one. Gilson, Sabel & Scott, Contracting for Innovation, *supra* note 102, at 476–88.

117. Gilson, Sabel & Scott, Braiding, *supra* note 14, at 1382–84. Repetition results in a learning process that reduces uncertainty, permitting a shift from a collaborative regime to a fully specified contract. Michael D. Ryall & Rachelle C. Sampson, Do Prior Alliances Influence Alliance Contract Structure?, *in* Strategic Alliances: Governance and Contracts 206, 206–07 (Africa Ariño & Jeffrey J. Reuer eds., 2006) (finding contracts are more complete or detailed when firms have prior alliances, whether with same firm or other firms).

c. *Collaborative Contracting in the Family Context.* — The collaborative contracting mechanism is ideal for experimentation (1) in an effort to achieve a goal that none of the parties can accomplish on his or her own and (2) where the parties are unwilling, owing to uncertainty about the viability of the collaboration, to commit in advance to a sustained investment in the relationship. These two conditions characterize the challenge facing parties desiring to establish novel family relationships. Consider again a hypothetical polygamous family. As in the commercial context, these parties face uncertainty about the viability of the venture they aim to undertake: It is unclear whether this (or any other) polygamous family represents a stable and enduring model for fulfilling family functions satisfactorily. Moreover, novel relationships such as this are not supported by strong social norms defining behavioral expectations and encouraging long-term commitment.

Under those conditions, the goals of this aspiring family can be furthered through processes that are analogous to the kind of collaborative agreements that have proved useful in commercial contexts. To be sure, the sources of relational uncertainty are somewhat different, and the form of the agreement among individuals in a novel family group is likely to differ from the commercial counterparts. A major difference between commercial collaborative contracts and their nascent familial counterparts, for example, is the form of the governance arrangement that creates the environment within which trust and confidence can grow.<sup>118</sup> In commercial settings, these structures are specified in formal written documents, while in the familial context the governance commitments typically arise out of mutual understandings often based on the parties' conduct over time. But this distinction does not diminish the significance or utility of the commitment to collaborate by an aspiring family unit.<sup>119</sup>

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118. See *supra* text accompanying notes 113–116 (describing how trust and confidence motivate parties to invest in collaborative relationships).

119. The Restatement of Contracts provides, “A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.” Restatement (Second) of Contracts § 4 (1981). A majority of states recognizes the validity of claims based on contracts implied in fact between unmarried cohabitants. Marsha Garrison, *NonMarital Cohabitation: Social Revolution and Legal Regulation*, 42 *Fam. L.Q.* 309, 315–16 (2008) (noting at least twenty-six states have approved some form of contract-implied-in-fact claims between cohabitants); see, e.g., *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976) (“In the absence of an express contract [between unmarried cohabitants], the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract . . . between the parties.”); *Doe v. Burkland*, 808 A.2d 1090, 1094 & n.4 (R.I. 2002) (pointing to large number of states “that recognize both express and implied contracts between unmarried cohabitants”); *Goode v. Goode*, 396 S.E.2d 430, 438 (W. Va. 1990) (“[A] court may order a division of property acquired by . . . unmarried cohabitants . . . who have considered themselves and held themselves out to be husband and wife. Such order may be based upon principles of contract, either express or implied . . .”).

Conduct-based agreements sometimes raise difficult problems of proof, but if the conduct among members of a novel relational group is clear, this form of contracting carries the same degree of legal significance. See, e.g., *Bailey v. West*, 249 A.2d 414, 416 (R.I.

In both the commercial and familial cases, however, the enforceable commitment is limited at the outset to the obligation to collaborate on efforts to pursue the parties' mutual goals.<sup>120</sup> A polygamous family commits to pursue an objective—long-term mutual care and support of each other and other dependents in their household—under circumstances where they are uncertain about the ultimate success of the relationship (or even the specific form that it may take). As noted above, the resulting agreement forms the basis for building trust as the foundation of a committed family. These collaborative agreements do not impose obligations to share property upon the dissolution of the relationship; the parties' uncertainty about the success of the collaboration makes such precise commitments infeasible. What then are the enforceable obligations of the family aspirants who do commit to collaborate? By analogy to the commercial context, each party is free to abandon the relationship at any time without facing any legal consequences. However, the initial commitment implies an enforceable obligation of family fidelity and loyalty during the period of ongoing collaboration.<sup>121</sup> On this basis, evidence that one of the parties was pursuing another familial relationship during the collaboration or selfishly appropriating shared resources gives rise to an enforceable claim for the value of any investments that injured parties have made in reliance on the commitment.<sup>122</sup>

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1969) (finding no conduct-based agreement where parties' conduct did not clearly indicate mutual agreement); see also, e.g., *Cont'l Forest Prods., Inc. v. Chandler Supply Co.*, 518 P.2d 1201, 1205 (Idaho 1974) (finding binding quasi-contractual obligation though declining to find implied-in-fact contract). For discussion, see Robert E. Scott & Jody S. Kraus, *Contract Law and Theory* 9 (5th ed. 2013). Some courts and legislatures have required that contracts between cohabitants be written. Ellman et al., *supra* note 52, at 943 (describing writing requirement in some states).

120. The unique feature of collaborative contracts is that they combine both legal and normative elements. The formal contract is limited to enforcement of the reliance investments that parties have made in the commitment to collaborate. See Gilson, Sabel & Scott, Braiding, *supra* note 14, at 1379–82 (discussing enforcement of formal and informal contracts); *infra* note 121 (citing example of breach of collaborative contract resulting in liability).

121. These contracts rely on low-powered enforcement techniques that cover only the commitment to collaborate, without controlling the course or the outcome of collaboration. This means that defection from the commitment—say, by cheating on the exclusive commitment to care for each other—would only entitle the injured party to recover her reliance costs as measured by investments to date in the collaboration and any opportunities foregone. For a commercial example of the kind of cheating on the commitment that creates liability and a discussion of the limited remedies available, see *Medinol Ltd. v. Boston Scientific Corp.*, 346 F. Supp. 2d 575, 591–600, 625–27 (S.D.N.Y. 2004).

122. This limited enforcement may be more available to some novel families than others. Courts have ordered equitable remedies such as restitution and constructive trust in cases involving financial claims by cohabitants. See *Salzman v. Bachrach*, 996 P.2d 1263, 1265–66 (Colo. 2000) (finding unjust-enrichment claim valid where one cohabitant, without paying, kept house that had been constructed at substantial expense to other cohabitant); *Harman v. Rogers*, 510 A.2d 161, 165 (Vt. 1986) (awarding plaintiff damages in restitution for services in operating defendant's store until cohabitation relationship deteriorated); Ellman et al., *supra* note 52, at 943–44 (discussing how courts can find

Family collaborations have both disadvantages and advantages relative to their commercial counterparts. Family relationships do not lend themselves to the kind of hierarchical structure that motivates consensus in the business setting, where higher levels of management review disputes. On the other hand, the coresidency of aspiring family members and their ability to monitor one another closely push the parties toward consensus and reinforce the collaboration in ways that establish trust. Moreover, the personal nature of the information shared by each party creates the potential for reputational harm if that information is later disclosed, making abandonment costly.<sup>123</sup>

Not all collaborative contracts creating familial obligations will be successful; some parties' relationships, and perhaps some relationship forms, may simply not develop into stable interdependent family groups. But in those relationships that do mature, understandings among the members of the polygamous family will become more complete through accrued experience as time goes on.<sup>124</sup> In this way, the polygamous family will move beyond collaborative agreements to enforceable understandings about their performance obligations.<sup>125</sup> Thus, just as parties in the pharmaceutical industry undertake formal agreements for drug development on the basis of information attained during the collaborative-contract phase, so too may a polygamous family in a collaborative family relationship reach formal understandings about property sharing, financial support, and obligations for child care. Again, as in the collaborative-contract phase, these agreements may be understandings implied from conduct based on duration, shared duties, and other objective proxies that arise over time in cohabitation relationships.<sup>126</sup>

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implied agreement or equitable principles when parties do not have express agreement). But if aspiring families are deemed immoral (as may be the case with polygamous families), courts may decline to enforce collaborative agreements.

123. Personal information shared in the family setting may be embarrassing if later disclosed, creating a situation analogous to hostage exchange. Scott & Scott, *Relational Contract*, *supra* note 76, at 1290–91.

124. See Kyle J. Mayer & Nicholas S. Argyres, *Learning to Contract: Evidence from the Personal Computer Industry*, 15 *Org. Sci.* 394, 396 (2004) (finding successive contracts between same two contracting partners become more complex over time as partners learn how to address contracting hazards).

125. See *infra* Part III.C.1 (discussing commitment ceremonies among polygamous groups that aspire to legal-family status).

126. As Part III.B explains, this evolution to enforceable contracts together with default rules based on relationship duration can resolve the difficult problem of sorting nonmarital cohabitation relationships. One response is for the state to freely enforce contracts implied in fact that provide for mutual support and shared property rights in long-term unions unless parties opt out. See Elizabeth S. Scott, *Domestic Partnerships, Implied Contracts, and Law Reform*, in *Reconceiving the Family* 331, 331 (Robin Fretwell Wilson ed., 2006) [hereinafter Scott, *Implied Contracts*] (“Domestic partnership status can provide greater financial security to dependent partners in informal unions than they have under current law, avoiding the harsh inequity that can result when one partner seeks to

In this first stage of collaboration, the evolutionary process can result in an aspiring polygamous family bound by (usually implied) contract to provide each member mutual support and care, with provisions for the assignment of responsibilities and for the distribution of property rights upon termination. Over time, one would expect to find a number of aspiring polygamous families living in committed, contractually based relationships.

3. *Moving from Isolated Collaborations to a Socially Integrated Collaborative Network.* — Even as a number of polygamous families establish stable family relationships based on contract, other challenges remain. How do isolated polygamous families coordinate to overcome collective-action impediments and ultimately become integrated into the larger social community? The process that leads first to association among polygamous families and then to integration serves two functions. At a pragmatic level, coordination is necessary for the novel family to begin the process of pursuing its political goals. Isolated polygamous families are unlikely to attract public attention, gain acceptance, or effectively communicate their identity as successful families. The formation of associations among aspiring novel families also facilitates the development of shared social norms and enables these polygamous families and their agents to signal collectively their identity with the larger social community.<sup>127</sup> Integration into the broader normative community further reinforces socially approved behavior and the stability of evolving relationships.<sup>128</sup>

a. *Normative Integration in Common-Purpose Communities: The Case of Collaborative Networks.* — Again we turn to the commercial context to provide an analogue for how family aspirants can resolve the problem of social isolation and form a coherent community with collective goals and shared norms. Commercial parties in particular industries form networks (or informal alliances) in order to enhance mutual collaboration in an environment where multilateral cooperation produces gains for all mem-

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exploit the other by enjoying the benefits of an intimate union without incurring financial obligations.”).

127. See *infra* text accompanying notes 155–161 (discussing scholarship on symbolic behaviors employed by outsider groups to facilitate cultural assimilation). To some extent, of course, even isolated polygamous families may internalize norms of established families. For a general discussion of the role of informal norms in regulating behavior through anticipation of external sanctions such as shaming or shunning, see Jon Elster, *The Cement of Society* 101–07 (1989); Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. Pa. L. Rev. 1643, 1656 (1996); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich. L. Rev. 338, 350–51 (1997); see also Scott & Scott, *Relational Contract*, *supra* note 76, at 1288–93 (discussing role of norms in reinforcing marital commitment).

128. See Karen S. Cook & Russell Hardin, *Norms of Cooperativeness and Networks of Trust*, in *Social Norms* 327, 328–30 (Michael Hechter & Karl-Dieter Opp eds., 2001) (noting parties have strong interest in abiding by their community’s norms so as to avoid exclusion).



bers in pursuit of their *individual* business ventures.<sup>129</sup> These networks are not aided by formal association (although individual members may execute bilateral contracts) but are linked informally by cooperative norms. Research by organizational sociologists shows how shared norms evolve and successfully control opportunism and other noncooperative behaviors in these networks even as new members join the network and others drop away.<sup>130</sup>

A business network consists of a number of independent firms that enter a pattern of collaboration designed to achieve the benefits of cooperation without formal integration.<sup>131</sup> Of particular interest for our example are networks consisting of a cluster of firms whose membership shifts over time. A useful exemplar is the tech transfer network consisting of a university/research entity (inventor), a number of biotechnology companies, large pharmaceutical firms, and venture capital firms joined by their common interest in the development of therapeutic compounds to cure disease.<sup>132</sup> These diverse entities share a desire to resolve uncertainty over the challenges they face collectively. To a large extent, network enforcement of these interparty understandings is purely relational,

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129. See Walter W. Powell, Kenneth W. Koput & Laurel Smith-Doerr, *Interorganizational Collaboration and the Locus of Innovation: Networks of Learning in Biotechnology*, 41 *Admin. Sci. Q.* 116, 116, 119 (1996) (arguing “locus of innovation will be found in networks of learning, rather than in individual firms”); Powell, *Market nor Hierarchy*, *supra* note 15, at 295 (describing networks as representative of “viable pattern of economic organization”); *infra* text accompanying notes 131–133 (defining network). Networks stimulate the development of norms, creating behavioral expectations that are internalized by network members and enforced informally by others. See Walter W. Powell, *Inter-Organizational Collaboration in the Biotechnology Industry*, 152 *J. Inst. & Theoretical Econ.* 197, 209 (1996) [hereinafter Powell, *Biotechnology Industry*] (describing networks in biotechnology industry as “a kind of macro-level mutualism” that is “both self-maintaining and self-enforcing”); *infra* text accompanying notes 135–138 (noting cooperation within networks does not depend on formal rights and obligations).

130. See Cook & Hardin, *supra* note 128, at 328–35 (noting sanctions against violation of community norms operate “spontaneously”); see also Michael Hechter & Karl-Dieter Opp, *What Have We Learned About the Emergence of Social Norms*, *in* *Social Norms*, *supra* note 128, at 394, 399–400 (reviewing the literature).

131. Hugh Collins, *Introduction to Gunther Teubner, Networks as Connected Contracts 1* (Hugh Collins ed., Michelle Everson trans., 2011). Network forms of organization share some common elements. Parties engage in reciprocal, preferential, mutually supportive actions. The basic assumption of network relationships is that one party is dependent on actions or behaviors of the other and that there are gains to be had from pooling resources to achieve common purposes. As networks evolve, it becomes more efficient for parties to exercise voice rather than exit. See Powell, *Market nor Hierarchy*, *supra* note 15, at 303–04 (explaining relationships between individual units in network forms of resource allocation).

132. These high-tech networks have been studied extensively by organizational sociologists. See, e.g., Powell, *Biotechnology Industry*, *supra* note 129, at 197 (exploring network-driven innovation in biotechnology); Powell, Koput & Smith-Doerr, *supra* note 129, at 116 (same); *supra* text accompanying notes 105–112 (describing collaborative agreements).

relying on a combination of reputation, repeated dealings, and tit-for-tat reciprocity.<sup>133</sup>

What are the factors that cause these biotechnology networks to form and then sustain themselves? In the context of rapid technological development, research breakthroughs are so broadly distributed that no single firm has all the capabilities necessary for success. Research to produce further technological advances requires *collective collaboration* designed to pool the broadly dispersed information of a large number of firms.<sup>134</sup> Thus, periods of rapid change stimulate a variety of collaborative behaviors aimed at reducing the inherent uncertainties associated with novel products or markets through the sharing of private information that benefits each firm in its own pursuits.<sup>135</sup> Despite the absence of formal rights and obligations internal to members of the network, the evidence suggests that the forces that govern cooperation are durable, with trust and cooperation increasing with participation in the network. When there is recognition of common interests and a high probability of future association, parties are more likely to cooperate and willing to punish defectors.<sup>136</sup> Cooperation is a continuing strategy rather than a one-shot calculation; networks use a reputation for cooperation and trustworthiness as a guide to future interaction.<sup>137</sup> At the level of the network community, there is a kind of mutualism or normative integration. This community-level mutualism is both self-maintaining and self-enforcing.<sup>138</sup>

b. *Network Collaboration and Normative Integration of Novel Families.* — The research on collaborative business networks offers lessons about how novel polygamous families can overcome their initial isolation, affiliate with similar groups with compatible norms, and over time develop and signal their identity with the larger community. The key elements in successful network collaborations are (1) the pursuit of a shared purpose through exchange of private information, (2) the collective recognition of the value of individual collaborators' performance, (3) the adherence to norms of cooperation that advance the collective purpose, and (4) the

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133. See Collins, *supra* note 131, at 21–25 (discussing evolution of norms of trust and cooperation that are enforced informally).

134. See Walter W. Powell, Networks of Learning in Biotechnology: Opportunities and Constraints Associated with Relational Contracting in a Knowledge-Intensive Field, *in* Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society 251, 252–53 (Rochelle Cooper Dreyfuss et al. eds., 2001) (discussing increase in relational contracting in biotechnology).

135. See *id.* at 265–66 (discussing advantages of collaboration in rapidly advancing fields).

136. For discussion of ways in which routines of cooperation develop, see Robert Axelrod, *The Evolution of Cooperation* 55–69 (1984).

137. See Powell, *Biotechnology Industry*, *supra* note 129, at 207–08 (observing firms develop more external ties as they gain reputation for competent cooperation).

138. See Ranjay Gulati, Does Familiarity Breed Trust? The Implications of Repeated Ties for Contractual Choice in Alliances, 38 *Acad. Mgmt. J.* 85, 93–94 (1995) (discussing how reputational considerations impact firms' potential for future alliances).

capacity of outsiders to gain membership in the network by developing a prosocial reputation.<sup>139</sup> The presence of these elements in successful network collaborations supports the prediction that as polygamous families evolve, they will form social networks around their common interests to advance their purpose of attaining social and legal recognition.

In the case of novel families, these network communities predictably emerge in response to the uncertainties associated with their shared vulnerability as social and legal “outsiders.”<sup>140</sup> Consider how a community of polygamous families might evolve from the collaborative-contracting stage discussed above. As the number of families increases, they become aware of similar aspiring families with common interests and relational patterns as well as a common purpose of obtaining social acceptance and legal recognition. They also understand that informal affiliation (and ultimately formal organizations) can provide social support and reinforcement of their own relationship goals and assist them in attaining their social and political goals.<sup>141</sup> Today, this process likely can be facilitated by the Internet, which provides a low-cost means to connect and interact with other polygamous families.<sup>142</sup> The emerging community is reinforced by interactions and information sharing that are more extensive and frequent than relations with others outside the community, to whom polygamous families remain outsiders.<sup>143</sup>

Theory and evidence from other settings predict that as a network of polygamous families forms and mobilizes in pursuit of their common interests and goals, collective family-commitment norms will emerge, including norms of cooperation, reciprocity, and trustworthiness.<sup>144</sup> The emergence of shared norms, enforced by the network community, strengthens each polygamous family’s commitment to fulfilling family functions, creating a feedback effect that reinforces the norms that iso-

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139. See Powell, Koput & Smith-Doerr, *supra* note 129, at 119–24 (exploring optimal characteristics of networks needed to drive innovation in biotechnology); Powell, *Market nor Hierarchy*, *supra* note 15, at 303–06 (discussing common characteristics of successful resource-allocation networks).

140. See *infra* Part III.A (describing how gay and lesbian support groups developed in struggle for legal protection of family relationships).

141. The literature on social movements is also informative here. See *infra* notes 148–149 and accompanying text (discussing insights offered regarding normative integration of novel polygamous families into social community).

142. See, for example, Polygamy Lifestyle, <http://www.polygamylifestyle.com> (last visited Feb. 4, 2015), which invites polygamist groups to find others in their locality. Websites such as this avoid the risk of public exposure in the search for similar groups.

143. See Samuel Bowles & Herbert Gintis, *The Moral Economy of Communities: Structured Populations and the Evolution of Pro-Social Norms*, 19 *Evolution & Hum. Behav.* 3, 7 (1998) (discussing how pro-social norms develop generally in groups). Members of polygamous groups may interact with others but are less likely to share information about their family relationships, for fear of social and legal sanctions. See *infra* Part III.C.1 (discussing obstacles polygamous families face with respect to normative integration).

144. See Scott, *Social Norms*, *supra* note 75, at 1908–12 (describing norms of reciprocity, loyalty, and fidelity in marriage as commitment norms).

lated polygamous families sought to establish through collaborative contracting.<sup>145</sup> The normative structure of the network thus serves the dual functions of stimulating the emergence of norms of cooperation in relation to one another as well as reinforcing commitment norms in individual families. These norms of family fidelity are powerful behavioral regulators, reinforced through expressions of approval and informal sanctions such as gossip, shaming, and exclusion.<sup>146</sup> They are also durable because they enhance the willingness of members of the community to collaborate to achieve their common purpose.<sup>147</sup>

The final step—the normative integration of novel polygamous families into the larger social community and their acceptance as fully functioning families—is one that is less well understood. Among the theories that have been offered, the literature on social movements offers insights about this process, at least as applied to some aspiring family categories.<sup>148</sup> Prominent legal scholars have analyzed identity-based social movements, in which individuals in legally disadvantaged groups have organized in pursuit of public acceptance, political recognition, and civil rights.<sup>149</sup> The marriage-equality movement, for example, is part of a

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145. Richard McAdams has developed the most comprehensive theory to explain the origin and regulation of norms. He explains that, for norm creation to occur, there must be a consensus within the community on the esteem worthiness of a target behavior. See McAdams, *supra* note 127, at 358–60 (outlining how consensus may arise). If there is also a risk of detection for deviation from the consensus and a capacity to publicize the deviation—through gossip or other informal or formal means—a norm can arise. *Id.* at 361–64. Considerable empirical evidence supports the notion that peer disapproval is an effective sanction against disfavored behavior. See, e.g., Donna M. Bishop, Legal and Extralegal Barriers to Delinquency: A Panel Analysis, 22 *Criminology* 403, 412 (1984) (“Those who have strongly internalized conventional norms tend . . . to fear that valued peer relationships would be jeopardized by violations of the law . . .”); Herbert Jacob, Deterrent Effects of Formal and Informal Sanctions, 2 *L. & Pol’y Q.* 61, 72 (1980) (“The relationship between peer disapproval of violating the law and compliance with it is substantial and consistent.”).

146. See Scott & Scott, *Relational Contract*, *supra* note 76, at 1288–92 (discussing enforcement of social norms, as well as effects of these norms on marital conduct).

147. See Gulati, *supra* note 138, at 93–94 (discussing influence of “mechanisms of social control” on “formation and maintenance of alliances”).

148. Sociologists have long studied how citizens organize themselves to pursue often transformative social and legal goals through social movements in contexts as varied as environmental justice, access to knowledge, civil rights, and animal rights. In recent years, many scholars have focused on the relationship between law and social movements. See *infra* notes 151, 154 (discussing process of norm evolution and lawyers’ role in advancing social movements); see also Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 *Ann. Rev. L. & Soc. Sci.* 17, 24–35 (2006) (examining historical interaction of law and social movements). For an early article in the legal literature, see Edward Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 *U. Pa. L. Rev.* 1 (2001).

149. Scholars have analyzed the impact of social movements on constitutional and public-law reform. See, e.g., Eskridge, *Channeling*, *supra* note 93, at 491–525 (analyzing dynamic interaction between identity-based movements and law). Reva Siegel has probed the impact of social movements on constitutional culture. See Reva B. Siegel, *Lecture*,

larger social movement by gays and lesbians to attain equal citizenship. As William Eskridge explains, collective action was stimulated by the designation of sexual orientation as a legally salient trait and source of discrimination.<sup>150</sup>

Although collective action by aspiring families is the foundation of their normative integration into the larger society, theory suggests that committed leaders, or norm entrepreneurs, will play a key role in mobilization to attain public acceptance.<sup>151</sup> These network leaders facilitate normative integration by creating organizational contexts for coordinating people and resources and by developing strategies to utilize the media and other outlets to spread information about the successful functioning of polygamous families.<sup>152</sup> Given that the ultimate goal of the

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Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA, 94 Calif. L. Rev. 1323, 1339–66 (2006) (analyzing how constitutional culture enables social movements to propose alternative understandings of constitutional tradition); see also Jack M. Balkin & Reva B. Siegel, Principles, Practices and Social Movements, 154 U. Pa. L. Rev. 927, 931–33, 943–50 (2006) (explaining how social movements can result in challenges to legitimacy of customary practices as inconsistent with long-standing principles). For discussion of the impact of social movements on statutory and constitutional civil-rights reform, see Lani Guinier & Gerald Torres, Changing the World: Notes Toward a Demosprudence of Law and Social Movements, 123 Yale L.J. 2740, 2796–2804 (2014).

150. Eskridge, Channeling, *supra* note 93, at 434–35. Eskridge explains how urbanization promoted consciousness raising among gays, reducing the costs of collective action. *Id.* at 461–62.

151. Both the social movement and other sociological literatures make this point. See Rubin, *supra* note 148, at 28–32 (describing key role of movement leaders in mobilization and information dissemination); see also Malcolm Gladwell, *The Tipping Point* 60–62 (2000) (describing “mavens,” norm entrepreneurs who learn a great deal about emerging norms and then share that knowledge with others, thus serving to spread information widely at low cost); Robert C. Ellickson, *The Market for Social Norms*, 3 Am. L. & Econ. Rev. 1, 10 (2001) (describing influential opinion leaders as “moral entrepreneurs”). Gladwell argues that mavens play a key role in spreading fads, fashions, and (by implication) norms. Gladwell, *supra*, at 60–62. These leaders can organize mobilization. See *infra* note 152 (outlining resources leveraged by leaders in mobilization efforts). They can also generate norm cascades, a process of rapid norm change. See Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. Chi. L. Rev. 1225, 1282–88 (1997) (concluding imposition of superior norm by actor can destabilize existing norms and trigger norm cascade); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021, 2035–36 (1996) [hereinafter Sunstein, *Expressive Function*] (observing potential of newly disseminated information to induce rapid shifts in norms); see also Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. Pa. L. Rev. 2181, 2185–86 (1996) (explaining “snowball” effect in evolution of norms and arguing rate of norm change accelerates as meaning and costs of obeying norm are altered); Cass R. Sunstein, *Social Norms and Social Roles*, 96 Colum. L. Rev. 903, 909 (1996) [hereinafter Sunstein, *Social Norms*] (arguing existing social conditions can be altered by changing background norms).

152. See Rubin, *supra* note 148, at 28–34 & n.61 (describing role of committed leaders in mobilizing resources and people to create a social movement). Rubin describes resources useful in mobilization expansively to include salient events (the Stonewall riots), court cases, and media coverage, as well as money and funds. *Id.* The use of media to dis-



polygamous-family group is legal recognition, and that some level of public acceptance is a predicate to attaining that goal,<sup>153</sup> it seems likely that norm entrepreneurs in this context will organize formal interest groups and use legal tools in pursuit of the community's goals. Predictably, lawyers often will perform the function of norm entrepreneurs.<sup>154</sup>

Scholars studying cultural change shed further light on the social-integration process, documenting how outsider groups, once affiliated, can signal their identity with and become assimilated into the larger cultural community.<sup>155</sup> The theory of identity signaling developed by economists studying changing social behaviors seems to fit the evolutionary process by which novel families become integrated into the larger society.<sup>156</sup> Researchers have studied how cultural conventions and behaviors function as symbols of identity, communicating aspects of individuals or groups to others in the social world.<sup>157</sup> Normative behaviors gain mean-

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pense information is a key strategy of social movements. See McCann, *supra* note 148, at 24 (finding social movements are "far more prone to rely on communicative strategies of information disclosure and media campaigns"). Today the Internet is an important source of information dissemination. See *supra* notes 140–143 and accompanying text (describing informational websites promoting polygamy and dispelling myths).

153. See Klarman, Jim Crow, *supra* note 97, at 367 (describing backlash to *Brown v. Board of Education*).

154. Cause lawyers have played a key role in pursuing and implementing legal change generated by social movements aimed at advancing racial and gender equality and gay and lesbian rights. See McCann, *supra* note 148, at 25–26 (discussing role of law and legal activism in advancing social movements); Austin Sarat & Stuart Scheingold, What Cause Lawyers Do *For*, and *To*, Social Movements: An Introduction, in *Cause Lawyers and Social Movements* 1, 1 (Austin Sarat & Stuart Scheingold eds., 2006) (arguing cause lawyers played pivotal role in movements for social change over last half century).

155. See Jonah Berger, Identity Signaling, Social Influence, and Social Contagion, in *Understanding Peer Influence in Children and Adolescents* 181, 183 (Mitchell J. Prinstein & Kenneth A. Dodge eds., 2008) [hereinafter Berger, Identity Signaling] ("[C]ultural tastes gain meaning, or signal value, through their association with groups, or similar types of individuals."). The recent history of changing public attitudes toward gay and lesbian relationships provides an example of this process of norm evolution and corresponding social change. See *infra* Part III.A (outlining role of same-sex couples' affiliations with social, political, and religious networks in propelling evolution of norms).

156. See, e.g., Berger, Identity Signaling, *supra* note 155, at 182–84 (describing identity-signaling theory as explaining divergence among social groups); see also Eric A. Posner, Law and Social Norms 18–22 (2000) (defining signals as actions intended to distinguish "types" of people); Eric A. Posner, Symbols, Signals, and Social Norms in Politics and Law, 27 J. Legal Stud. 765, 797 (1998) ("[A]n important class of social norms arises from signaling games in which people choose actions that signal loyalty to states and communities."). These versions of signaling theory all draw on the work of Michael Spence. See generally A. Michael Spence, Market Signaling: Informational Transfer in Hiring and Related Screening Processes (1974) (discussing market signaling).

157. See, e.g., Mary Douglas & Baron Isherwood, The World of Goods: Toward an Anthropology of Consumption 36–47 (1979) (discussing use of goods as cultural convention); Michael R. Solomon, The Role of Products as Social Stimuli: A Symbolic Interactionism Perspective, 10 J. Consumer Res. 319, 319 (1983) (focusing on "consumers' relationships with the objects they produce and purchase" and arguing "significant portion of consumption behavior is actual social behavior—and vice versa").

ing, or signal value, through their association with groups or similar types of individuals. The normative identity that polygamous families or other novel families signal is based on their family relationships of long-term commitment to mutual care and support; thus, the essential elements of this identity are similar to those of established families.<sup>158</sup> The society at large associates successful commitment norms with established families and comes to recognize that polygamous families successfully perform familial functions, although their behaviors and identity may not mirror precisely those of marital families.<sup>159</sup> This process of identity signaling is advanced in part by advocates (and perhaps litigation strategists) who, by serving as norm entrepreneurs, accelerate the process of social change. As the cohort of novel families grows, public awareness of their identity increases as well, and if the identity signaling is successful,<sup>160</sup> a cascading process of changing social attitudes follows, culminating in public tolerance or acceptance.<sup>161</sup>

Research on the mechanisms that produce social change also aids in formulating predictions about this last phase of norm integration. Jonah Berger documents a process of change occurring when an idea, cultural view, or attitude spreads contagiously through continuous observation

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158. William Eskridge describes a politics of recognition through which an identity group signals to the majority that the legally stigmatized trait is simply a benign variation and should not be the basis of legal discrimination. See Eskridge, *Channeling*, *supra* note 93, at 467–78 (detailing life cycle of identity-based social movements). This equality-based claim (that novel families are similar to established families) is inherently integrative. See *id.* at 487–88 (“[T]he assurance game feature needed for a social movement to take off for the long haul was much easier to achieve when the goals were integrationist.”).

159. Once these outsiders adopt the family-behavior signal, the normative meaning of a family itself may evolve. In other words, as the social change occurs, the set of socially accepted family behavior expands to include the unique means of cementing commitment that the novel group has developed. See Berger, *Identity Signaling*, *supra* note 155, at 183–84 (arguing when outsiders use group’s identity signal, signal’s meaning can change). Thomas Stoddard argued that extending marriage rights to gays and lesbians would positively influence the meaning of marriage. See Stoddard, *supra* note 59, at 13 (arguing extending marriage rights to gays can help divest marriage of its past sexist trappings).

160. Of course, it is possible that the signaling will not be effective, and public awareness of polygamous families will lead to alarm accompanied by public hostility.

161. See Ellickson, *supra* note 151, at 26–27 (reviewing literature on norm cascades and tipping points); see also McAdams, *supra* note 127, at 365–72 (describing feedback cycle in which “[p]eople compet[e] to be ‘well thought of’ compared to others” and “lead[] the way to new and higher levels of norm compliance”); Sunstein, *Social Norms*, *supra* note 151, at 909 (“Norm bandwagons occur when small shifts lead to large ones, as people join the ‘bandwagon’; norm cascades occur when there are rapid shifts in norms.”). Economists have studied similar phenomena as well, focusing on bandwagon effects, herd behavior, and information cascades. See, e.g., Abhijit V. Banerjee, *A Simple Model of Herd Behavior*, 107 *Q.J. Econ.* 797, 798 (1992) (discussing herd behavior and defining it as “everyone doing what everyone else is doing, even when their private information suggests doing something quite different”); Sushil Bikchandani, David Hirshleifer & Ivo Welch, *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 *J. Pol. Econ.* 992, 994 (1992) (arguing informational cascades explain fads, fashions, booms, and crashes).

and word of mouth.<sup>162</sup> This happens typically when the idea is associated with images or narratives linked to “high-arousal emotions” such as anger or love<sup>163</sup> and when the behavior is observable and public.<sup>164</sup> Identity signaling by novel families can have this effect. For example, consider the narratives of committed gay and lesbian couples, often with children, that became familiar during the campaign to extend marriage rights to these couples.<sup>165</sup> Berger’s research suggests that these positive images may have played a key role in generating relatively rapid changes in public attitudes.

The process of identity signaling does not proceed seamlessly: It imposes costs on polygamous families, especially in the early period. Successful signaling and normative integration depends on families’ willingness to sacrifice some privacy, as public familiarity and acceptance can only happen if polygamous families are open about their relationships. To varying degrees, identity signaling exposes the family to the risk of negative public reactions, ranging from curiosity and skepticism to hostility and outrage. For some novel families (including polygamous families), the costs are likely to be high, including the risk of criminal sanctions for living together as families.<sup>166</sup> Predictably, aspiring families will be reluctant to incur onerous costs. In this situation, some exogenous shock that increases costs on continuing their closeted lives may serve as a catalyst, motivating novel families to bear the initial costs of living openly.<sup>167</sup> Over time, as the public becomes familiar with the nature of novel family relationships, the hope is that acceptance grows and hostility dissipates.

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Although our model proceeds in three discrete stages for analytical purposes, the collaborative process through which polygamous families seek to gain public acceptance overlaps substantially with the group’s effort to attain legal recognition. First, as discussed earlier, novel families

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162. See Jonah Berger, *Contagious* 21–25 (2013) (“These are the six principles of contagiousness: products or ideas that contain *Social Currency* and are *Triggered*, *Emotional*, *Public*, *Practically Valuable*, and wrapped into *Stories*.”).

163. See Jonah Berger & Katherine L. Milkman, What Makes Online Content Viral?, 49 *J. Marketing Res.* 192, 197 (2012) (arguing content evoking high-arousal emotions is more viral than other content).

164. For a discussion of the role of social influence, see Nicholas A. Christakis & James Fowler, *Connected: The Surprising Power of Our Social Networks and How They Shape Our Lives* 3–15 (2009).

165. See *infra* Part III.A (highlighting evolution of gay and lesbian family relationships from outsider status to full integration and legal recognition).

166. See *infra* Part III.A.1 (discussing how antisodomy laws inhibited gay couples from living together pre-*Lawrence*).

167. See *infra* Part III.A.2 (discussing how exogenous shock of AIDS crisis functioned as a catalyst for gays’ coming out and advocating for legal protection of their family relationships).

and their advocates pursue their legal goals in part by signaling their identity with established families, assuring the public about the quality of their relationships. Second, as discussed below, regulators are likely to extend legal protections through an incremental process that allows state actors to gain information about the aspiring family category. The incremental extension of legal rights has feedback effects that also contribute to public familiarity and acceptance, while at the same time minimizing backlash that might follow from full recognition of unfamiliar groups.<sup>168</sup> Moreover, legal recognition in itself powerfully signals legitimacy that, in turn, contributes to growing public acceptance of novel families.<sup>169</sup>

4. *Resolving the Verifiability Problem Through Collaborative Regulation.*

a. *Legal Certification to Guard Against Uncertain Risks.* — Even if the novel family category gains social tolerance or acceptance (and success is certainly not guaranteed), the state independently has an interest in verifying that these groups will function effectively for all members before it certifies the category as a legal family. But here the state faces a significant information problem: Family behavior is private and thus resists efforts to verify the quality of family functioning, especially when (as with polygamous families) there is little by way of historical experience. Some types may appear to perform family functions satisfactorily; however, they may create latent risks that affect some members but are not immediately apparent. For example, polygamous-family groups may appear to provide care and support to members harmoniously, but experience over time might reveal difficulties maintaining equality norms and avoiding exploitation.<sup>170</sup> (Indeed, it is plausible that groups lacking the qualities of well-functioning families might organize to pursue social acceptance and legal recognition through fraudulent means, a stratagem

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168. See *infra* text accompanying notes 175–178 (discussing incremental approach); see also Klarman, *Closet to Altar*, *supra* note 96, at 145–55 (describing backlash to early cases extending marriage rights to gay couples).

169. This interaction has been widely studied by scholars examining the expressive function of the law. Larry Lessig has shown that the state, if sensitive to the social meaning of particular behaviors, can stimulate desired changes through legal expression. See Lessig, *supra* note 151, at 964–73. Cass Sunstein extended Lessig's analysis by analyzing how legal regulation can affect normative structures as well. See Sunstein, *Expressive Function*, *supra* note 151, at 2026–35 (discussing interaction between expressive law and social norms). Sunstein suggested that antilittering statutes have such an expressive effect. See *id.* at 2030, 2032–33. These changes in preferences and values occur because the social meaning of these behaviors has been changed. See *id.* at 2031–33. Thereafter, a norm cascade can result through the stimulation of individual preferences being changed by the legal regulation. *Id.* at 2032–33; see also McAdams, *supra* note 127, at 355–66 (arguing law can change behavior by signaling consensus that is only dimly perceived by larger community); *infra* text accompanying note 249 (reemphasizing expressive function of law). For a review and critique of this literature, see Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 Va. L. Rev. 1603, 1623–30 (2000).

170. The risk of coercion and exploitation may be as great in dyadic relationships.

that time likely would reveal.<sup>171</sup>) Time might also reveal that conjugality serves a key bonding function for unrelated adults and, as a consequence, multigenerational and voluntary kin groups may turn out to be fragile, thereby jeopardizing dependent members.<sup>172</sup> To be sure, these particular risks may not materialize, but the general point is that the state will demand sufficient information to mitigate latent risks as part of the process of determining whether a novel family category should receive family status and the societal benefits and resources that follow.<sup>173</sup> The network of polygamous families, in turn, has an interest in providing information that assures the state that this category meets the state's expectations for family functioning.

Several challenges may arise. Some aspiring groups may deserve legal recognition as fulfilling family functions but be difficult to evaluate because they are based on unconventional commitments or appear to be continuing the process of evolution. Other groups may face unusual political obstacles, despite their apparently effective functioning, that impede full recognition as families. Thus, the state must seek to understand the context in which the aspiring family group functions; in doing so, lawmakers are likely to proceed with caution, perceiving that once rights are extended, they will be difficult to withdraw. For some groups, an iterative process may be appropriate: one in which the legal rights and responsibilities are assigned incrementally, allowing the state to monitor family functioning over time in the process of certifying family status.<sup>174</sup> For other aspiring family categories, particularly those that are truly novel, a collaborative approach may also require joint efforts by the state and the group to establish a standard consisting of best practices that are policed informally by the network itself.

b. *An Iterative Approach.* — The state can verify and certify the family status of an aspiring family type in several ways, including judicial recognition on constitutional grounds, state legislative enactments, and administrative regulation. For some family groups, such as cohabiting

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171. Several readers suggested this possibility as a component of the political-economy story. For example, fundamentalist polygamists could influence public opinion by masking their undesirable qualities and falsely signaling that their relationships were reformed.

172. Of course, nonconjugal unions avoid the destabilizing threat of infidelity.

173. See *infra* Part III.C (discussing possible paths to recognition for polygamous and nonconjugal relationships).

174. Several scholars, often drawing on the experience in some European countries, have argued that the path to marriage equality for gay couples is a step-by-step process. William Eskridge has argued that an incremental approach to the extension of marriage rights for gay couples was important to increase public acceptance. See William N. Eskridge, Jr., *Equality Practice: Civil Unions and the Future of Gay Rights* 115–18 (2002) (arguing step-by-step legal process is means to changing public attitudes). For a contrary view, see Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 *Duke J. Gender L. & Pol'y* 105, 106 (2010) (arguing incremental theory's predictions have not been borne out in practice and incremental theory overlooks significant differences between Europe and the United States).



couples or (perhaps) multigenerational groups, the risk of exploitation and instability may be relatively modest because the aspiring family is modeled on a familiar form. For these groups, full family status can be attained through a straightforward iterative process, with rights and obligations extended to the group incrementally.<sup>175</sup> Through this collaborative process, state actors acquire information informally about the quality of the family commitments over time, allowing the state to verify that family functions are being performed satisfactorily.<sup>176</sup> For example, if the state creates a family status with some relationship rights and privileges, it can acquire information comparing dissolution rates to divorce rates.<sup>177</sup> Moreover, the iterative process may have a feedback effect, with the limited family status expediting public acceptance of the novel group as “real” families. Eventually, the state’s monitoring function recedes as the new family category stabilizes and ultimately attains full legal recognition. This iterative process provides greater certainty for the parties and for third parties dealing with the new families and enhances the privacy and freedom of individual members of the recognized category to pursue their relationship goals without external monitoring.<sup>178</sup>

*c. Joint Mitigation of Risks Through “Best Practices” Collaboration.* — For novel groups that pose substantial informational and/or political challenges, the state may require a more formal collaborative process in conjunction with an iterative approach. For polygamous-family groups, for example, uncertainty is high because there are no models for family behavior or tested responses to the possible risks that may arise from certification of the group. In this case, the state may turn to a more interactive collaboration to enunciate and enforce “best practices” that mitigate those risks. Here, the goal is to encourage common efforts by the polygamous families themselves to create binding commitments that minimize the risk of perceived harm.

Once again we invoke a commercial analogue—one that at first blush may seem quite remote from the realm of novel families. Leafy

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175. For a discussion of the key features of public-private collaborations, see Charles F. Sabel & William F. Simon, Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering, 110 Mich. L. Rev. 1265 (2012).

176. See *infra* Part III.A for a discussion of how relationship rights have been extended incrementally to gay and lesbian couples, culminating in the right to marry.

177. See *infra* Part III.A for a discussion of the iterative process through which gay couples obtained marriage-equality rights, first through limited domestic-partnership laws and then civil-union statutes.

178. Mary Anne Case argues that the licensing of marriage protects couples’ privacy from government intrusion in ways not available to couples in domestic partnerships. See Mary Anne Case, Marriage Licenses, 89 Minn. L. Rev. 1758, 1772 (2005) [hereinafter Case, Marriage Licenses] (arguing “marriage in many respects licenses greater flexibility and less state intrusion into family life” than its alternatives). Once a couple marries, they can have separate bank accounts, live apart, etc., whereas domestic partners must provide evidence of marriage-like behavior to establish their status. *Id.* at 1772–76. Novel families would enjoy the same freedom once the new category is recognized.

green vegetables pose particular risks because they are often eaten raw and, today, often sold in “salad mixes” that mingle greens picked in different locations, thus expanding the possibilities for cross-contamination.<sup>179</sup> Following an outbreak of illness, California designated an authority to establish safety standards or “best practices” for the farms from which member handlers buy.<sup>180</sup> These standards require growers and processors to identify hazardous control points and report the measures undertaken to mitigate the hazard.<sup>181</sup> Inspectors from the California Department of Food and Agriculture monitor compliance,<sup>182</sup> but the ultimate sanction for noncompliance is suspension or withdrawal of a recalcitrant member’s right to use a service mark, and thus temporary or permanent exclusion from the industry is enforced informally.<sup>183</sup>

The success of this “best practices” approach offers a regulatory prototype for the mitigation of harms from legal recognition of some categories of novel families where a more formal process of information sharing and monitoring is warranted. Such a collaboration has four key elements: (1) creation of a formal association of aspiring families in the high-risk group, (2) information exchange between the group (or its representatives) and the state to establish best practices, (3) monitoring by the state to ensure that the group complies with those practices, and (4) informal enforcement by the association through shaming or exclu-

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179. Gilson, Sabel & Scott, *Contract and Innovation*, supra note 16, at 211–12. All actors in the food supply chain have an interest in protecting their market by developing a regime of practices that reduce the chances for contamination and limit its effect. The state, as the protector of public health, has complementary interests. *Id.* at 212–13.

180. The authority was delegated to a Board established by the Leafy Green Product Handlers Agreement (LGMA). State of Cal. Dep’t of Food & Agric., California Leafy Green Products Handler Marketing Agreement 7–8 (effective as amended from Mar. 5, 2008) [hereinafter *California Marketing Agreement*], available at <http://www.cdffa.ca.gov/mkt/mkt/pdf/CA%20Leafy%20Green%20Products%20Handler%20Agreement.pdf> (on file with the *Columbia Law Review*). LGMA is governed by a thirteen-member board, chosen by the state Secretary of Agriculture from nominations by the membership. Twelve must be representatives of the handler members of the organization; the thirteenth is supposed to represent “the public.” *Id.* at 3.

181. The LGMA additionally requires each handler to maintain records that permit identification of the farm and field from which all components of its products originate in case contamination is later discovered. *Id.* at 6; see Cal. Leafy Green Prods. Handler Mktg. Bd., *Commodity Specific Food Safety Guidelines for the Production and Harvest of Lettuce and Leafy Greens* 13 (Aug. 2, 2013), available at <http://www.lgma.ca.gov/wp-content/uploads/2014/09/California-LGMA-metrics-08-26-13-Final.pdf> (on file with the *Columbia Law Review*) (including provision imposing recordkeeping requirements on signatory handlers).

182. *California Marketing Agreement*, supra note 180, at 9.

183. The handler members, in turn, commit to deal only with farms that comply with the standards. *Id.* There are other private standard-setting and certification regimes, such as GlobalGAP (for “good agricultural practices”), an organization formed by major European retailers, and the Global Food Safety Initiative, a private international organization that assesses certification regimes in accordance with a set of meta-standards. Sabel & Simon, supra note 175, at 1284.

sion.<sup>184</sup> In the case of polygamous families, risks that might attend the recognition of multiple-party family types include the exploitation of minors and other “minority” interests or harms caused by instability of the family relationships. Problems such as these can be addressed through a collaborative process in which the aspiring families provide information to the state about the context in which they fulfill their family functions, the families and the state collectively establish benchmarks that embody their expectations for the support and care of all family members, and the families collectively seek to promote compliance with the benchmarks.<sup>185</sup> Through mechanisms such as this, the state, as it incrementally extends rights, can certify well-functioning family categories subject to a regulatory scheme tailored to their needs but serving the general goals of facilitating well-functioning family relationships. Thereafter, as with marriage, deference to family privacy will translate into minimal state involvement for any individual family that is licensed, so long as the family is intact.

d. *The Licensing of Individual Families.* — Once a novel family type is certified, a registration or licensing system, analogous to marriage licensing, would provide a means by which individual families in the novel type can obtain formal status. A set of simple, clear rules can be used to authorize licensing of all families that qualify under the certified category. A registration process has a number of benefits: It provides public acknowledgment of qualifying family categories, signaling that recognized relationships fulfill important social functions. Further, registration embodies commitment in a concrete form, reinforcing family-commitment norms.<sup>186</sup> Licensing is also a means by which the legal obligations and rights that attend the status are clearly defined and assigned, providing security and certainty to family members through postdissolution enforcement with modest administrative and judicial costs.<sup>187</sup> For example, if formal family status confers on polygamous families a right to share property with other family members, registration permits individual families to avoid difficult proof problems that are likely to accompany contractual enforcement.<sup>188</sup> Registration reduces the risk that

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184. See Gilson, Sabel & Scott, Contract and Innovation, *supra* note 16, at 210–13 (illustrating four elements in context of California LGMA).

185. Part III.C.1 discusses how polygamous groups can adopt a best-practices regulatory framework.

186. The public signal of family status reinforces social norms by resolving any uncertainty the community may have had about the nature of the relationship.

187. Licensing avoids error and administrative costs that regulators face when they seek to evaluate individually the claims of informal aspiring families. It also protects family privacy. See *infra* note 188 (discussing issues aspiring families face in securing rights).

188. See Scott, Implied Contracts, *supra* note 126, at 332–37 (describing difficult proof problems faced by partners in informal unions seeking to enforce contractual understandings); see also Ira Mark Ellman, “Contract Thinking” Was *Marvin’s* Fatal Flaw, 76 Notre Dame L. Rev. 1365, 1367–73 (2001) [hereinafter Ellman, Contract Thinking]

exploitative individuals will succeed in enjoying the benefits of family relationships while avoiding reciprocal obligations (as sometimes happens in informal unions).<sup>189</sup> Finally, and importantly, a formal licensing process protects family privacy by avoiding intrusive inquiries to determine whether an individual family embodies the qualities that justify family status, another cost that informal families must bear.<sup>190</sup>

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One challenge to the proposed iterative approach is that the evolutionary process toward full legal protection could have the effect of limiting the options for family formation if fully licensed families supplant other less comprehensive forms. In this vein, marriage critics have expressed concern that same-sex couples will be channeled into marriage as an exclusive status that crowds out other forms of legal protection.<sup>191</sup> This risk must be acknowledged, but, as suggested below, the iterative approach is not necessarily incompatible with policies of recognizing more limited family relationships.<sup>192</sup>

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(arguing contract analysis inappropriate to decide issues related to intimate relationships, including division of property).

189. Ellman, Contract Thinking, *supra* note 188, at 1370–73. The American Law Institute (ALI) domestic-partnership status creates marriage-like obligations between longtime cohabitants. Am. Law Inst., *supra* note 21, at §§ 6.04–06. However, American states have not adopted either the *Principles* or the domestic-partnership status. See Michael R. Clisham & Robin Fretwell Wilson, American Law Institute's *Principles of the Law of Family Dissolution*, Eight Years After Adoption: Guiding Principle or Obligatory Footnote?, 42 Fam. L.Q. 573, 589–95 (2008) (describing failure of states to adopt ALI Domestic Partnership Principles). Some European countries, as well as Canada, Australia, and New Zealand, have sought to mitigate these problems by expanding legal protection to cohabitants and their children. See Polikoff, Beyond Marriage, *supra* note 1, at 111–20 (describing cohabitants' legal rights in these countries).

190. When parties in nonmarital families seek legal recognition of their family status, an individualized inquiry often requires parties to provide decisionmakers with intimate information about their relationship, living arrangements, and intentions. See, e.g., *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 55 (N.Y. 1989) (supporting judgment with evidence of parties' living arrangements over time, daily schedules, joint bank accounts, and life-insurance-policy beneficiaries, in addition to other typically private information). In contrast, the acquisition of a marriage license automatically confers the rights and obligations of family status and allows the group freedom to arrange their lives as they wish without oversight and monitoring by the state. See Case, Marriage Licenses, *supra* note 178, at 1765, 1771–73 (discussing freedom enjoyed by married couples). Marital obligations are not formally enforced in intact relationships, but they provide the basis for property division and support after divorce. See Dukeminier et al., *supra* note 48, at 393–95 (discussing property allocation and alimony following divorce). Presumably the same approach would be applied to other registered families.

191. See, e.g., Katherine M. Franke, Op-Ed., Marriage Is a Mixed Blessing, N.Y. Times (June 23, 2011), <http://www.nytimes.com/2011/06/24/opinion/24franke.html> (on file with the *Columbia Law Review*) (arguing New York's recognition of same-sex marriage may lead to abolition of domestic-partnership status).

192. For a discussion of options for limited family status, such as “designated beneficiary” agreements under Colorado law, see *infra* Part III.C.2.b.

## III. FROM THEORY TO PRACTICE: THE WAY FORWARD FOR NEW FAMILIES

The model developed in Part II describes in stylized terms the discrete stages of an evolutionary process by which novel family groups can use collaborative techniques to overcome the uncertainty that otherwise impedes legal recognition. This Part turns to real-world contexts in which the stages of relational novelty, isolation, and nonverifiability are largely overlapping and thus less sharply delineated. Part III.A shows how the movement toward recognition of marriage rights for gay and lesbian couples has successfully deployed collaborative strategies in an evolutionary process that is broadly consistent with the model described in Part II.<sup>193</sup> Part III.B examines, in contrast, the somewhat puzzling failure of families based on informal cohabitation to attain legal recognition. We suggest that the complexity and variety of these relationships pose daunting information problems that have inhibited collaborative affiliation, normative integration, and legal recognition. Part III.C focuses on relationships not involving dyadic intimate pairs, including polyamorous, multigenerational, and voluntary kin groups. These aspiring family groups cannot be measured as readily against the template provided by marriage. Thus, they pose more complex governance issues than does the standard two-party union, and that may create challenges for the state in evaluating family functioning. The collaborative framework developed in Part II highlights both the challenges and the opportunities that these truly novel family forms face in achieving a legal status.

A. *Same-Sex Family Relationships: From Outlaw to Mainstream*

The modern history of gay and lesbian family relationships conforms roughly to our account of how a novel family category evolves from outsider status to full integration and legal recognition.<sup>194</sup> Through the

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193. Of course, there are many possible accounts of the marriage-equality movement. Constitutional law scholars have focused on the impact of the LGBT social movement on constitutional culture. See, e.g., Balkin & Siegel, *supra* note 149, at 948 (explaining how LGBT social movement challenged settled constitutional practices as violating antidiscrimination principle); Eskridge, *Channeling*, *supra* note 93, at 423–25 (describing politics of recognition through which gays and lesbians (and other identity groups) employ equal-protection principle to gain majority rights).

194. To be sure, the path to recognition of marriage rights for LGBT couples does not precisely follow the stylized three-stage process described in this Article. But the overall pattern largely tracks this course. Two landmark Supreme Court decisions dramatically mark the change in status we describe. In 1986, the Supreme Court in *Bowers v. Hardwick* upheld the constitutionality of a state antisodomy statute as applied to sexual intimacy between gay men. 478 U.S. 186, 189–90 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003). Twenty-seven years later, in *United States v. Windsor*, the Court struck down section 3 of the Defense of Marriage Act on the ground that excluding same-sex couples married under state law from the federal definition of marriage offended the dignity of their relationships. 133 S. Ct. 2675, 2683–84, 2695–96 (2013).



1980s and well beyond, many (perhaps most) gays were closeted,<sup>195</sup> hiding their sexual orientation and intimate relationships from family, friends, and colleagues to avoid harsh social and legal sanctions.<sup>196</sup> But even in this hostile environment, couples cohabited in long-term unions<sup>197</sup> and developed clear understandings of their mutual obligations.<sup>198</sup> Same-sex couples in committed relationships began to execute contracts to formalize their understandings regarding property sharing, support, inheritance, and related issues.<sup>199</sup> Over time these couples and their advocates, motivated by a common goal of attaining respect and legal protection for their relationships, increasingly formed networks through their social, political, and religious affiliations.<sup>200</sup> This movement contributed to greater openness about sexual orientation, stimulated media interest, and increased public familiarity with—and acceptance of—same-sex family relationships. In recent years, advocates have sought and won legal recognition of these unions through an incremental pro-

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195. See Glenn Chapman, Being Gay in America: A 50-Year Love Story, Raw Story (May 8, 2013, 7:20 AM), <http://www.rawstory.com/rs/2013/05/being-gay-in-america-a-50-year-love-story/> (on file with the *Columbia Law Review*) (providing two gay interviewees' description of socially stigmatized lifestyle in 1950s and 1960s).

196. See, e.g., *Lawrence*, 539 U.S. at 562 (describing one state's "statute [that made] it a crime for two persons of the same sex to engage in certain intimate sexual conduct" but that remained in force as late as 2003); *Bowers*, 478 U.S. at 193–94 (noting as of 1986 "24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults").

197. Mary Mendola, *The Mendola Report: A New Look at Gay Couples* 9–10 (1980) (recounting results of 1970s survey in which sixty-seven percent of same-sex-couple respondents defined their marital status as "[p]ermanently committed" and eleven percent as "[l]iving with someone"); see, e.g., Anne Hull, Just Married, After 51 Years Together: Activist Gay Couple Accepts Leading Role, *Wash. Post*, Feb. 29, 2004, at A1 (describing life of gay couple who had been together for over fifty years); Chapman, *supra* note 195 (same).

198. For instance, George Chauncey's history of the movement describes gay partners exchanging vows in marriage ceremonies performed in the Metropolitan Community Church in the 1970s and 1980s. See Chauncey, *supra* note 19, at 91–92.

199. See, e.g., *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 406 (Ct. App. 1988) (upholding oral contract between same-sex partners in which one promised to provide financial support in exchange for emotional support and household services); *Posik v. Layton*, 695 So. 2d 759, 760 (Fla. Dist. Ct. App. 1997) (upholding written support agreement between same-sex partners); *Anonymous v. Anonymous*, No. 121930-2002, 2004 WL 396492, at \*8–\*10 (N.Y. Sup. Ct. Feb. 9, 2004) (upholding written agreement between same-sex partners that decided division of property upon termination of relationship).

200. The movement from isolation to broad societal acceptance is generally seen as starting in the 1950s with the Mattachine Society, a group of gay men in Los Angeles who wanted to create social acceptance for LGBT people. See C. Todd White, *Pre-Gay L.A.* 16–18 (2009) (tracing founding of Mattachine); see also James T. Sears, *Behind the Mask of the Mattachine* 147–50 (2006) (including early Mattachine members' accounts of founding). The modern LGBT-rights movement is then seen as having started with the Stonewall riots in 1969. See Sam Deaderick & Tamara Turner, *Gay Resistance: The Hidden History* 39–40 (1997) ("Stonewall marked the beginning of saying 'NO' to all forms of gay oppression.").

cess, culminating in the largely successful (and ongoing) effort to obtain marriage rights.

1. *Contract and Commitment.* — Throughout the twentieth century, gays and lesbians faced intense public animus. Until quite recently, polls showed that most Americans thought same-sex intimacy was immoral;<sup>201</sup> social and religious conservatives in the 1980s even suggested that AIDS was God's punishment for sinful behavior.<sup>202</sup> Some states had criminal antisodomy statutes aimed at gays, until these laws were ruled unconstitutional in 2003.<sup>203</sup> Discrimination in employment, housing, and education was rampant, and gays and lesbians received little protection under antidiscrimination laws.<sup>204</sup> Unsurprisingly, in this environment many LGBT individuals chose not to publicize their sexual orientation or their intimate relationships, a stance that in many settings prevailed into the twenty-first century.

Despite this hostile climate, many gays and lesbians found partners and cohabited in stable unions in the last decades of the twentieth century.<sup>205</sup> Functioning in isolation from the larger society, and often from

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201. From the 1970s to the early 1990s, polls showed that between two-thirds and three-quarters of Americans thought gay sexual relations were "always wrong." Tom W. Smith, Nat'l Opinion Res. Ctr., *Public Attitudes Toward Homosexuality 2* (Sept. 2011), available at [http://www.norc.org/PDFs/2011%20GSS%20Reports/GSS\\_Public%20Attitudes%20Toward%20Homosexuality\\_Sept2011.pdf](http://www.norc.org/PDFs/2011%20GSS%20Reports/GSS_Public%20Attitudes%20Toward%20Homosexuality_Sept2011.pdf) (on file with the *Columbia Law Review*). That percentage dropped to forty-four percent by 2010. *Id.*; cf. Jeffrey M. Jones, *Americans' Opposition to Gay Marriage Eases Slightly*, Gallup (May 24, 2010), <http://www.gallup.com/poll/128291/americans-opposition-gay-marriage-eases-slightly.aspx> (on file with the *Columbia Law Review*) (noting, since 1996, support for same-sex marriage has increased among major political and ideological subgroups).

202. See, e.g., Hans Johnson & William Eskridge, *The Legacy of Falwell's Bully Pulpit—A Commentary* by William Eskridge '78, Yale Law Sch. (May 19, 2007), <http://www.law.yale.edu/news/5131.htm> (on file with the *Columbia Law Review*) (recounting Reverend Jerry Falwell's polarizing statements concerning homosexuality).

203. *Lawrence v. Texas*, 539 U.S. 558, 573, 578–79 (2003) (striking down Texas sodomy ban as unconstitutional). Some states still have these laws in their criminal codes, but they do not enforce them against consenting adults. See Lauren Langlois, *12 States Still Have Anti-Sodomy Laws a Decade After They Were Ruled Unconstitutional*, Huffington Post (Apr. 21, 2014), [http://www.huffingtonpost.com/2014/04/21/anti-sodomy-laws\\_n\\_5187895.html](http://www.huffingtonpost.com/2014/04/21/anti-sodomy-laws_n_5187895.html) (on file with the *Columbia Law Review*) (reporting Alabama, Florida, Idaho, Kansas, Louisiana, Michigan, Mississippi, North Carolina, Oklahoma, South Carolina, Texas, and Utah still have antisodomy laws "on the books").

204. The first nondiscrimination law for LGBT people was passed in Wisconsin in 1981; the next was passed eight years later in Massachusetts. David E. Newton, *Same-Sex Marriage: A Reference Handbook 21* (2010). These laws generated strong opposition and efforts to repeal. Ultimately the Supreme Court intervened in *Romer v. Evans* to prevent repeal of these laws. 517 U.S. 620, 623–24 (1996).

205. Many relationships have become familiar through litigation, the media, historical accounts, and cases. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013) (holding multidecade lesbian relationship must be recognized under federal law); *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 51, 55–56 (N.Y. 1989) (relying on evidence of same-sex couple's ten-year relationship to conclude they qualified as a "family"); William N. Eskridge, Jr. & Darren R. Spedale, *Gay Marriage: For Better or for Worse?* 251 (2006)

family, friends, and colleagues, same-sex couples constructed their relationships in a highly uncertain environment in which they lacked legal protection and often social support. The evidence suggests that many same-sex couples had clear understandings of their mutual obligations to care for and support one another and to share income and property. Despite stresses unfamiliar to straight couples, these couples were able to sustain stable relationships on the basis of these understandings.<sup>206</sup> Some couples in supportive communities signaled their marriage-like commitment to one another through wedding ceremonies<sup>207</sup> even though neither regulators nor (often) family recognized their commitments.<sup>208</sup>

The understandings of same-sex couples in committed relationships during this period can be seen as analogous to collaborative agreements in the business setting. These early cohabitation agreements were experimental endeavors worked out under conditions of high uncertainty. In this environment, collaborative commitments served to guide normative behavior and to build the trust and confidence that reinforces committed relationships. But even couples who exchanged marriage vows well understood that their commitments were not legally enforceable. By the 1990s, however, courts began to apply equitable remedies in cases where one partner had exploited the other in a grossly unfair manner. Thus, for example, some courts imposed constructive trusts on property held in legal title by one cohabitant where the other had invested large amounts on improvements in reliance on the relational understanding.<sup>209</sup> These judicial responses resemble the limited enforcement of collaborative contracts by courts seeking to deter blatant cheating on the commitment to collaborate.

Over time, as the collaborative model predicts,<sup>210</sup> some cohabiting couples began to execute formal agreements creating mutually enforceable property rights. Although courts first enforced agreements between

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(describing forty-year relationship of Jack Baker and Mike McConnell); Chapman, *supra* note 195 (describing fifty-year relationship).

206. See *Braschi*, 543 N.E.2d at 55 (describing same-sex couple's interwoven social lives and shared financial commitments). See generally Mendola, *supra* note 197, at 41–95, 118–35 (providing in-depth qualitative interviews with same-sex couples).

207. See *supra* note 198 (describing ceremonies).

208. See Chauncey, *supra* note 19, at 98–99 (discussing pattern during AIDS crisis of hospitals and regulators favoring biological family of LGBT patient over partners without legal relationship); see also, e.g., *In re Guardianship of Kowalski*, 478 N.W.2d 790, 791 (Minn. Ct. App. 1991). Karen Thompson's partner, Sharon Kowalski, was injured in a severe car accident. *Id.* Kowalski's family prevented Thompson from seeing her partner for several years. *Id.* A Minnesota appeals court ultimately ruled that Thompson was Kowalski's lawful guardian. *Id.* at 797.

209. See, e.g., *Cannisi v. Walsh*, No. 6435/2005, 2006 WL 3069291, at \*4 (N.Y. Sup. Ct. Oct. 30, 2006) (holding lesbian partner "articulated a colorable claim for a constructive trust on the proceeds of the sale of the subject property").

210. See *supra* Part II.B (describing collaborative model).

cohabitants in the 1970s,<sup>211</sup> few early cases involved same-sex couples. But by the 1990s, courts began to enforce contracts between gay and lesbian partners that specified mutual financial obligations and understandings.<sup>212</sup> Indeed, cohabiting same-sex couples probably were (and are) more likely to execute formal contracts than their straight counterparts because contracting provided the only means by which same-sex couples could secure some of the rights and obligations that automatically follow from marital status.<sup>213</sup>

2. *Political Action, Public Acceptance, and Normative Integration.* — By the 1980s and 1990s, the number of lesbian and gay families increased, and the need for legal protection and political advocacy became more pressing. Scholars agree that two developments during this period—the AIDS epidemic and the lesbian baby boom—motivated social and political actions that had far-reaching consequences.<sup>214</sup> A critically important element of this process was the formation of networks by couples and advocates aiming to promote the rights of couples in same-sex relation-

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211. See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (holding express or implied agreements between cohabitants are enforceable).

212. See, e.g., *Doe v. Burklund*, 808 A.2d 1090, 1094 (R.I. 2002) (“[I]t is not illegal for two men to live together, much less to contract and to enter into partnerships with each other while doing so.”); see also *supra* note 199 (citing cases upholding contracts between same-sex couples).

213. Couples who are not able to marry or enter civil unions frequently execute contracts regarding support, property sharing, inheritance, custody rights, guardianship, and other matters. Although estimating the number of such agreements is speculative, in 1995, it was estimated that ten percent of same-sex couples had written relationship agreements. Margaret F. Brinig, *Domestic Partnership and Default Rules, in Reconceiving the Family*, *supra* note 126, at 269, 277 (reporting study). Some websites and legal documents encourage same-sex couples to execute written agreements, especially in states where they lack other means of legal formalization. See, e.g., *Model Cohabitation Agreement for Domestic Partners*, LexisNexis Legal Newsroom: Estate and Elder Law (Oct. 5, 2010, 10:31 AM), <http://www.lexisnexis.com/legalnewsroom/estate-elder/b/estate-elder-blog/archive/2010/10/05/model-cohabitation-agreement-for-domestic-partners.aspx> [hereinafter *Model Cohabitation Agreement*] (on file with the *Columbia Law Review*); *Sample Domestic Partnership Agreement*, Human Rights Campaign, [www.hrc.org/files/assets/resources/Domestic\\_Partner\\_Agreement.pdf](http://www.hrc.org/files/assets/resources/Domestic_Partner_Agreement.pdf) (on file with the *Columbia Law Review*) (last visited Feb. 4, 2015). Even where gay couples marry or enter civil unions, they may execute contracts out of concern that other states will not recognize their status. Cf. Karel Raba, *Note, Recognition and Enforcement of Out-of-State Adoption Decrees Under the Full Faith and Credit Clause: The Case of Supplemental Birth Certificates*, 15 *Scholar* 293, 303–04 (2013) (describing struggle of same-sex parents who adopt out of state to get revised birth certificates in states where same-sex joint adoption is prohibited).

214. See Chauncey, *supra* note 19, at 95–111 (identifying AIDS epidemic and lesbian baby boom as key catalysts stimulating marriage movement); see also NeJaime, *supra* note 80, at 102 (“The HIV/AIDS epidemic brought countless gay men out of the closet, united lesbians and gay men behind a common cause, and profoundly shaped the organization of the LGBT movement.”).

ships, in part through strategies that increased acceptance of gay and lesbian family life in the larger society.<sup>215</sup>

The AIDS epidemic was a traumatic, exogenous shock that played a powerful role in triggering the process of social and legal reform because it provided stark evidence of the vulnerability of committed same-sex relationships when partners were required to engage with society's institutions. First, AIDS patients who lost their health insurance because they were too ill to work were not eligible for family coverage on their partners' plans.<sup>216</sup> Moreover, when gay and lesbian individuals contracted AIDS (or, indeed, any serious illness or disability<sup>217</sup>), their partners frequently were prevented from participating in treatment decisions, acting as proxy medical decisionmakers, or even from planning funerals and memorial services, often despite decedents' express wishes.<sup>218</sup> Surviving gay partners had no inheritance rights; in the absence of a will (and sometimes even with one), parents, siblings, and even more remote relatives acquired the deceased partner's property.<sup>219</sup> In response to the plight of patients and their partners, the gay and lesbian community rallied, uniting in ways that reinforced its cohesiveness, and an energized corps of legal advocates mobilized to assert same-sex couples' rights.<sup>220</sup> The AIDS crisis effectively motivated collective action and provided a foundation for a powerful interest group aimed at gaining protection of same-sex couples' family rights. Despite the onerous cost of living openly, the stakes had become sufficiently high that more couples were willing to take the risk.

215. See Chauncey, *supra* note 19, at 41–42, 47 (describing mobilization of gays, with large numbers coming out to friends, workmates, and families in late 1980s and 1990s); Newton, *supra* note 204, at 22–23 (describing LGBT mobilization in response to AIDS crisis, followed by efforts to gain rights for same-sex couples).

216. See Chauncey, *supra* note 19, at 96 (describing loss of insurance).

217. The case of Sharon Kowalski discussed above, see *supra* note 208, also had a galvanizing impact, as it made clear how little protection gay partnerships had. See Chauncey, *supra* note 19, at 111–16 (recounting impact of *Kowalski* case on LGBT movement and suggesting marriage could have offered the couple legal security).

218. See Chauncey, *supra* note 19, at 99–100 (discussing difficulties same-sex partners have encountered in planning funerals and memorial services); William B. Rubenstein, *We Are Family: A Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships*, 8 J.L. & Pol'y 89, 91 (1991) ("AIDS has made the lack of a legal relationship crushingly apparent to lesbian and gay couples: a gay man whose partner is dying of AIDS may have difficulty inquiring about his condition or visiting him in the hospital because the couple has no legal relationship to one another.").

219. See, e.g., *In re Cooper*, 592 N.Y.S.2d 797, 801 (App. Div. 1993) (rejecting same-sex partner's claim to "surviving spouse" designation for purpose of inheritance).

220. See Chauncey, *supra* note 19, at 41–42 ("AIDS also led to an unprecedented mobilization of gay men and [a] . . . degree of cooperation between them and the large number of lesbians who played leading roles in the response to AIDS."); see also Tina Fetner, *How the Religious Right Shaped Lesbian and Gay Activism* 55–56 (2008) ("Lesbians, though not afflicted by AIDS in large numbers, were on the front lines of [AIDS response] . . . In dealing with this tragedy, the lesbian and gay community . . . established close networks of organizations working toward common causes.").



In the last decades of the twentieth century, this drive for legal protection gained momentum from another source as well. Lesbian (and some gay) couples began to form families and to have and raise children, usually biologically related to one partner and often produced through sperm donation (or surrogacy arrangements).<sup>221</sup> This trend in itself indicated the growing desire of same-sex couples to live together in committed family relationships that, of necessity, could not function in complete privacy. But these families faced daunting legal challenges unknown to different-sex couples. The partner who lacked a biological connection with the child enjoyed no parental rights.<sup>222</sup> If the legal parent died or became incapacitated, her parents or other relatives were likely to gain custody; despite having lived for years in a parent-child relationship, the partner became a legal stranger to the child.<sup>223</sup> Further, if the parents separated, the nonbiological parent's relationship with her children continued only with the consent of her former partner.<sup>224</sup> Even biological parents lacked secure parental rights as courts in some states were prepared to find lesbians to be unfit parents on the basis of their sexual orientation.<sup>225</sup>

The growing interest among gays and lesbians in forming family relationships, together with increased awareness of how vulnerable these relationships were, became a catalyst for collective action, conforming roughly to the collaborative processes described in Part II. During the last decades of the twentieth century, same-sex couples increasingly affiliated through social, political, and religious networks, strengthening bonds within the gay community.<sup>226</sup> Commitment ceremonies grew in po-

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221. See Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 *Buff. L. Rev.* 341, 342 n.2 (2002) (reporting as many as ten million U.S. children live in families with same-sex parents).

222. See *id.* at 342 ("Even though . . . lesbian couples jointly make the decision to have children, the party who is artificially inseminated is a legal parent because of her biological tie, while the other party has no legal parental role because of her lack of biological connection to the child.").

223. See, e.g., *T.F. v. B.L.*, 813 N.E.2d 1244, 1254 (Mass. 2004) (rejecting custodial claim of biological mother's former female partner, who had no biological relationship to child); *Adoption of Tammy*, 619 N.E.2d 315, 320 n.8 (Mass. 1993) (observing that, despite mother's designating her partner as child's guardian in her will, partner's custodial claim was vulnerable if mother died).

224. See, e.g., *Alison D. v. Virginia M.*, 572 N.E.2d 27, 28 (N.Y. 1991) (rejecting visitation petition by lesbian *de facto* parent).

225. Divorced or unmarried custodial mothers were vulnerable to challenges by fathers or other relatives claiming that lesbian mothers were unfit. In a much publicized Virginia case, *Sharon Bottoms*, a lesbian mother, lost custody to her mother. *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (awarding custody to grandmother in part because "[c]onduct inherent in [mother's] lesbianism is punishable as a Class 6 felony in the Commonwealth").

226. See *supra* notes 214–225 and accompanying text (discussing role of AIDS crisis and lesbian baby boom in promoting network formation among gays).

pularity, and religious couples underwent nonlegal marriage ceremonies before friends and family in supportive churches.<sup>227</sup> Committed same-sex couples, together with their children, formed the basis of a normative community of families that provided social support to one another.<sup>228</sup> Particularly with the abolition of antisodomy laws criminalizing same-sex intimacy,<sup>229</sup> these families also began to live more openly in their communities and had more interaction with straight neighbors, teachers, and others, who thus could observe their conventional character.<sup>230</sup>

The common goal of securing legal protection for gay and lesbian family relationships was critically important at several levels. First, it served to reinforce cohesiveness within the gay community, with a growing network of same-sex couples and their legal and political advocates collaborating on a common set of political and social objectives.<sup>231</sup> As with the formation of collaborative business networks, this network was supported by the shared goals and common purposes of its members. A norm of cooperation and open exchange of information among network members was essential to the effective pursuit of legal reform. But the evidence suggests that the reform movement served as well to solidify family-commitment norms. Beginning in the 1980s with the effort to persuade localities to pass domestic-partnership ordinances offering limited protection to gay couples, the clear strategy of the advocates who

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227. See Chauncey, *supra* note 19, at 91–92 (discussing how “[p]erforming [same-sex] marriages was a central mission of the Metropolitan Community Church”); James N. Birkitt, MCC and Marriage Equality, *Metro. Cmty. Churches* (2013), <http://mccchurch.org/overview/history-of-mcc/mcc-and-marriage-equality/> (on file with the *Columbia Law Review*) (describing early Metropolitan Community Church marriage ceremonies).

228. See Amanda K. Baumle et al., *Same-Sex Partners* 84–91 (2009) (discussing reasons LGBT people interact and may choose to live in predominantly LGBT neighborhoods). The formation of a social community began even before the catalyst of the AIDS crisis triggered a more activist approach. See, e.g., Katherine Turk, “Our Militancy Is in Our Openness”: Gay Employment Rights Activism in California and the Question of Sexual Orientation in Sex Equality Law, 31 *Law & Hist. Rev.* 423, 432–33 (2013) (describing early formation of social networks among gays and lesbians, together with organizations like Mattachine Society and Daughters of Bilitis in 1950s).

229. See *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (finding criminal statute prohibiting sodomy unconstitutional).

230. Much evidence supports the contention that positive attitudes follow when straights have personal association with gays. See *infra* note 237 (citing polling data and scholarship supporting this contention). Surveys show that the percentage of the population that has personal relationships with gays has increased dramatically in the last twenty years. See, e.g., Pew Research Ctr., *In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as Inevitable* 14 (2013) [hereinafter *Pew Research Ctr., Gay Marriage Debate*], available at <http://www.people-press.org/files/legacy-pdf/06-06-13%20LGBT%20General%20Public%20Release.pdf> (on file with the *Columbia Law Review*) (reporting eighty-seven percent of Americans know a gay individual, compared to sixty-one percent twenty years ago).

231. See Fetner, *supra* note 220, at 46 (discussing change resulting in “[t]he most influential organizations in the movement [being] entrenched in a battle for equal rights”).

emerged to lead the political and legal movement (the norm entrepreneurs) was to define the relationships of same-sex couples as being like marriage and *not* like those of different-sex couples who chose not to marry.<sup>232</sup> Advocates described same-sex couples seeking relationship recognition as being in committed, financially dependent unions like their married counterparts. Thus, the state's decision to exclude these couples from benefits that married couples enjoyed was unfair discrimination.<sup>233</sup> This strategy, in effect, both defined the norms for same-sex family relationships and encouraged conformity to those norms as the means to attain the community's legal goals.<sup>234</sup>

The movement to gain legal protection of same-sex family relationships also contributed importantly to the transformation of public attitudes about these relationships and ultimately about same-sex marriage. To be sure, changes were not immediate. Although the AIDS epidemic awakened in the gay community a realization of the importance of legal reform, public anxiety about AIDS in the 1980s seemed to intensify hostility toward gay and lesbian relationships.<sup>235</sup> But, in our view, collaboration within the community on political and legal goals and consensus about the means to achieve them contributed both indirectly and directly to public acceptance of same-sex relationships.<sup>236</sup> The suc-

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232. Douglas NeJaime makes this point in describing the strategy of advocates seeking to acquire domestic-partnership status for same-sex couples in Los Angeles and San Francisco in the 1990s:

[T]o achieve nonmarital recognition, advocates appealed to marriage's conventions, pointed to the unique exclusion of same-sex couples from marriage, and stressed same-sex couples' commonality with married couples. In building domestic partnership, they emphasized marital norms—such as adult romantic affiliation, mutual emotional commitment, and economic interdependence—capable of including same-sex couples. By challenging marriage's primacy while arguing for recognition in terms defined by marital norms, advocates contested, accepted, and ultimately shaped the institution of marriage while simultaneously portraying same-sex relationships as marriage-like.

NeJaime, *supra* note 80, at 113.

233. *Id.*

234. As William Eskridge explains, the constitutional equal-protection framework deployed by legal advocates intrinsically has propelled gay-rights activists toward an integrative approach, since it is based on a claim that same-sex couples were similarly situated to opposite sex couples but denied equal treatment. See Eskridge, *Channeling*, *supra* note 93, at 480 (“[C]onstitutional doctrine not only channels the energies of these social movements . . . but also channels their rhetoric and perhaps even their ideologies into the furrows plowed by judges and law professors.”).

235. Gallup polls during the peak of the AIDS crisis from 1986 to 1988 consistently found that over fifty percent of respondents thought that sex between same-sex partners should be illegal, a marked rise from previous years. See *Gay and Lesbian Rights*, Gallup, <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx> (on file with the *Columbia Law Review*) (last visited Feb. 4, 2015).

236. To be sure, many advocates in the gay community regret the priority given to attaining marriage rights as well as the assimilative strategy adopted to shift public opin-

cess of the marriage-equality movement required effective engagement with mainstream society. In part, this happened informally as more lesbian and gay couples came out, signaling the quality of their relationships to the straight community; in turn, that community became familiar with same-sex couples living together (often with their children) in conventional family relationships. Research studies clearly indicate that personal association with gay and lesbian individuals as friends, family members, colleagues, and neighbors is strongly correlated with positive attitudes and support for marriage equality.<sup>237</sup> Gays and lesbians coming out dispelled fears held by many straights: Two adults raising their children in a loving and supportive family was hardly a threatening image. The softening of public attitudes, in turn, made it easier for lesbian and gay families to live more openly, further reinforcing the trend toward public acceptance.<sup>238</sup>

The strategies of legal and political advocates and the behavior of gay and lesbian couples who became the public face of the marriage-equality movement also were critical to the process of changing public attitudes. Advocates understood their role as norm entrepreneurs and chose their clients carefully;<sup>239</sup> most petitioners had compelling histories of long-term, committed relationships.<sup>240</sup> In various ways, advocates, petitioners, and other couples highlighted by the media signaled to the

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ion. See Franke, *Marriage Politics*, supra note 71, at 237–42 (challenging movement's focus on marriage); Nancy D. Polikoff, *Commentary, We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 Va. L. Rev. 1535, 1549 (1993) (opposing strategy emphasizing similarities between "our relationships and heterosexual marriages"); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 Yale L.J. 1623, 1635 (1997) (arguing advocating marriage is "contrary to . . . 'the affirmation of gay identity and culture'" (quoting Ettelbrick, supra note 71, at 14)); see also Ettelbrick, supra note 71, at 16 (arguing same-sex marriage "would undermine *our* movement to recognize many different kinds of relationships").

237. See Pew Research Ctr., *Gay Marriage Debate*, supra note 230, at 16 ("68% of those who know a lot of gays and lesbians . . . say they support same-sex marriage."); see also *Public Opinion and Constitutional Controversy* 201 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) ("As more Americans have come to realize that they do know gay people, they have also become more comfortable with them.").

238. Pew Research Ctr., *A Survey of LGBT Americans: Attitudes, Experiences, and Values in Changing Times* 32, 34 (2013), available at [http://www.pewsocialtrends.org/files/2013/06/SDT\\_LGBT-Americans\\_06-2013.pdf](http://www.pewsocialtrends.org/files/2013/06/SDT_LGBT-Americans_06-2013.pdf) (on file with the *Columbia Law Review*) (reporting ninety-two percent of LGBT individuals say society is more accepting of them than a decade ago, and attributing change to individuals knowing and interacting with LGBT persons, to the efforts of advocates, and to LGBT couples raising families).

239. See NeJaime, supra note 80, at 123 (describing strategy of emphasizing marriage-like quality of gay relationships as contrasted with unmarried straight couples).

240. See, e.g., Robert Barnes, *Gay Marriage at the Supreme Court: A 'Real Couple' Behind Prop 8 Challenge*, Wash. Post (Mar. 9, 2013), [http://www.washingtonpost.com/politics/gay-marriage-at-the-supreme-court-a-real-couple-behind-prop-8-challenge/2013/03/09/39dd12f0-869e-11e2-98a3-b3db6b9ac586\\_story.html](http://www.washingtonpost.com/politics/gay-marriage-at-the-supreme-court-a-real-couple-behind-prop-8-challenge/2013/03/09/39dd12f0-869e-11e2-98a3-b3db6b9ac586_story.html) (on file with the *Columbia Law Review*) (discussing relationship of couple challenging California's Proposition 8).

larger community the marriage-like quality of same-sex relationships.<sup>241</sup> The clear message was that if gays and lesbians were actually allowed to marry, couples that chose this option could be expected to conform to stabilizing family norms embraced by the larger community. Media reports confirmed that the desire of gay and lesbian partners to undertake formal commitment through marriage was motivated by the same sentiments and goals as those of straight couples. As Edie Windsor, who successfully challenged the constitutionality of DOMA's exclusion of same-sex spouses from federal benefits,<sup>242</sup> famously remarked, "[M]arriage is this *magic* thing . . . [It] symbolizes commitment and love like nothing else in the world."<sup>243</sup> Eighty-four-year old Windsor and the story of her decades-long relationship with Thea Spyer became world famous; *TIME* magazine named her a runner-up as the 2013 Person of the Year.<sup>244</sup> In our view, the success of the marriage-equality movement owes a great deal to the impact on public and lawmakers' opinion of the stories of petitioners such as Windsor. Without these stories, it is unclear whether the powerful legal arguments made on the petitioners' behalf would have succeeded.<sup>245</sup>

This account of the gay and lesbian movement to attain marriage rights tracks the evolutionary process from isolation to integration described in Part II. Couples and their advocates collaborated in forming normative communities with the common aim of gaining social recognition and legal protection of gay and lesbian families, and these networks reinforced and supported their family relationships. Partly through the strategies of advocates, same-sex couples signaled effectively to the larger

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241. See *id.* (describing "remarkably normal" couple involved in Proposition 8 challenge). Attractive and nonthreatening couples petitioning for legal equality, registering for civil unions, and applying for marriage licenses came to represent all lesbian and gay families subject to legal discrimination. Cf. Franke, *Marriage Politics*, *supra* note 71, at 239–40 (raising objections to prioritization of same-sex marriage recognition in marriage-equality movement).

242. In *United States v. Windsor*, the Court struck down DOMA's section 3, which limited the applications of provisions under federal law relating to marriages of different-sex couples. 133 S. Ct. 2675, 2695–96 (2013).

243. Nina Totenberg, Meet the 83-Year-Old Taking On the U.S. over Same-Sex Marriage, NPR (Mar. 21, 2013, 4:36 PM), <http://www.npr.org/2013/03/21/174944430/meet-the-83-year-old-taking-on-the-u-s-over-same-sex-marriage> (on file with the *Columbia Law Review*).

244. Eliza Gray, Edith Windsor, the Unlikely Activist, *TIME* (Dec. 11, 2013), <http://poytime.com/2013/12/11/runner-up-edith-windsor-the-unlikely-activist> (on file with the *Columbia Law Review*); see also Adam Gabbatt, Edith Windsor and Thea Spyer: 'A Love Affair that Just Kept On and On and On,' *Guardian* (June 26, 2013), <http://www.theguardian.com/world/2013/jun/26/edith-windsor-thea-spyer-doma> (on file with the *Columbia Law Review*) (describing relationship).

245. Roberta Kaplan, attorney for Edie Windsor, described the importance of Windsor's personal story to the success of the constitutional litigation. Roberta A. Kaplan, "It's All About Edie, Stupid": Lessons from Litigating *United States v. Windsor* (Feb. 28, 2014) (transcript on file with the *Columbia Law Review*).



community that they lived in conventional, marriage-like relationships, caring for each other and for their children. This process has led to a dramatic shift in public attitudes; by 2013, a majority of Americans approved of marriage rights for same-sex couples.<sup>246</sup> In many parts of the country, the social status of committed same-sex couples has evolved in a generation from that of isolated outsiders or even outlaws to families who are integrated into the broader normative community.

3. *Incremental Progress Toward Legal Recognition.* — Although the stages of the collaborative process described in Part II are usefully separated for analytic purposes, one would expect the networking-social-acceptance stage and the legal-recognition stage to overlap substantially; this overlap has certainly characterized the marriage-equality movement. As explained above, the realization that same-sex unions were legally vulnerable directly led to the creation and strengthening of LGBT networks.<sup>247</sup> Moreover, signaling the marriage-like qualities of same-sex family relationships, which contributed to social acceptance, was partly a legal strategy; the evidence suggests that this signaling furthered legal claims, reassured lawmakers, and influenced public opinion.<sup>248</sup> Finally, the extension of legal protections has had a powerful expressive effect, legitimating gay relationships and reinforcing positive public attitudes.<sup>249</sup> In the past decade, of course, the dynamic synergy between evolving public attitudes and legal reform has been extraordinary.<sup>250</sup>

Incremental progress toward full legal recognition of same-sex couples' family relationships began in the late 1980s and continues today. In the early period, LGBT legal advocates enjoyed limited successes; a few courts recognized gay or lesbian couples as *de facto* families for particu-

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246. See Lydia Saad, In U.S., 52% Back Law to Legalize Gay Marriage in 50 States, Gallup (July 29, 2013), <http://www.gallup.com/poll/163730/back-law-legalize-marriage-states.aspx> (on file with the *Columbia Law Review*) (providing polling showing majority support for same-sex-marriage rights).

247. See *supra* notes 214–230 and accompanying text (discussing this trend).

248. See *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (discussing “aspects of married and family life” embodied in many same-sex relationships); *supra* Part II.A.2 (discussing positive effects of social acceptance of same-sex family relationships).

249. See *supra* note 169 and accompanying text (discussing expressive function of law).

250. The views of lawmakers changed in response to public opinion, of course, but also sometimes as a result of personal experience. See Richard Socarides, Rob Portman and His Brave, Gay Son, *New Yorker* (Mar. 15, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/03/rob-portman-and-his-brave-gay-son> (on file with the *Columbia Law Review*) (noting Senator Rob Portman changed his mind in favor of same-sex marriage after his son came out); Robin Toner, Cheney Stakes Out His Own Position on Gay Marriage, *N.Y. Times* (Aug. 25, 2004), <http://www.nytimes.com/2004/08/25/politics/campaign/25cheney.html> (on file with the *Columbia Law Review*) (describing Dick Cheney's shift in opinion on marriage equality after acknowledging sexuality of his lesbian daughter).

lar purposes,<sup>251</sup> and cities such as New York and San Francisco allowed gay and lesbian couples (and sometimes others) to register as domestic partners, a status that carried symbolic meaning but few benefits.<sup>252</sup> In the mid and late 1990s, a handful of state legislatures enacted laws creating registration systems that conferred a somewhat broader array of rights and benefits.<sup>253</sup> Following the Vermont Supreme Court opinion in *Baker v. State* in 1999,<sup>254</sup> several states enacted civil-union statutes allowing same-sex couples to register for a status that closely mirrored marriage in its tangible benefits and obligations but lacked its respected status.<sup>255</sup> In 2003, the Supreme Court held antisodomy laws unconstitutional in *Lawrence v. Texas*,<sup>256</sup> removing a major obstacle to safe family formation for same-sex couples. Thereafter, beginning in 2003 with the Massachusetts case of *Goodridge v. Department of Public Health*, courts and legislatures have extended the right to marry to same-sex couples.<sup>257</sup> Today, thirty-six states and the District of Columbia recognize this right.<sup>258</sup>

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251. See *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 893–94 (Mass. 1999) (holding lesbian partner to be de facto parent); *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 55 (N.Y. 1989) (holding gay couple to be de facto family).

252. See NeJaime, *supra* note 80, at 142–46 (describing efforts to enact domestic-partnership ordinances in Los Angeles and San Francisco); see also Raymond C. O'Brien, Domestic Partnership: Recognition and Responsibility, 32 San Diego L. Rev. 163, 184 (1995) (describing New York City ordinance extending “health benefits to both homosexual and heterosexual domestic partners”). Different-sex couples were allowed to register under some domestic-partnership ordinances, but the purpose was to extend some recognition to gay and lesbian couples. See, e.g., *id.* (noting in New York City, benefits were originally “contemplated only for homosexual couples” but were eventually also extended to heterosexual domestic partners).

253. Hawaii and California were two such states. Haw. Rev. Stat. Ann. §§ 572C-1, 572C-6 (LexisNexis 2010) (creating reciprocal beneficiary status); see *In re Marriage Cases*, 183 P.3d 384, 413 (Cal. 2008) (describing 1999 California legislation creating statewide domestic-partnership status).

254. 744 A.2d 864, 886, 889 (Vt. 1999) (holding ban on same-sex marriage violated Common Benefits Clause of state constitution).

255. Vermont responded to *Baker* by enacting a comprehensive civil-union statute, as did several other states over the next decade. Misha Isaak, Comment, “What’s in a Name?”: Civil Unions and the Constitutional Significance of “Marriage,” 10 U. Pa. J. Const. L. 607, 640–42 (2008) (describing states’ enactment of civil unions and domestic partnerships, with many, but not all, rights of marriage).

256. 539 U.S. 558, 578 (2003).

257. 798 N.E.2d 941, 957 (Mass. 2003) (finding right to marriage for same-sex couples in state).

258. 36 States with Legal Gay Marriage and 14 States with Same-Sex Marriage Bans, ProCon.org, <http://gaymarriage.procon.org/view.resource.php?resourceID=004857> (on file with the *Columbia Law Review*) (last updated Jan. 13, 2015, 8:14 AM). This number continues to change; for an updated list, see National Status Maps, Marriage Equality USA, [http://www.marriageequality.org/national\\_maps](http://www.marriageequality.org/national_maps) (on file with the *Columbia Law Review*) (last visited Feb. 4, 2015). Prior to October 6, 2014, nineteen states and the District of Columbia recognized same-sex marriage. Adam Liptak, Supreme Court Delivers Tacit Win to Gay Marriage, N.Y. Times (Oct. 6, 2014), <http://nytimes.com/2014/10/07/us/denying-review-justices-clear-way-for-gay-marriage-in-5-states.html> (on file with the *Columbia Law*

This account is familiar and need not be repeated in detail. For the purposes of this Article, three aspects of the regulatory history are important. First, as predicted in the model set out in Part II, the process was iterative, allowing lawmakers to gain information incrementally about the functioning of same-sex unions to determine whether these groups provided the stability and capacity to fulfill family functions. In this way, lawmakers were able to meet the challenge of verifying that an aspiring family group that had been the target of hostility and disparagement deserved legal protection. Courts and legislatures evaluated the claim by marriage opponents that children raised by gay and lesbian parents faced harms not experienced by children raised by married parents—and that therefore, these couples lacked the qualities to function adequately as families.<sup>259</sup> Evidence of same-sex couples raising their children satisfactorily accumulated over time, along with scientific studies indicating that the opponents' claim was groundless.<sup>260</sup> This information greatly weakened the argument against extending the right to marry to gay and lesbian couples since few disputed that, in the absence of particular harm, children benefited if their parents were able to enjoy the benefits of marriage.<sup>261</sup>

The second key feature of the process by which legal rights were extended to gay couples suggests another way in which regulators and advocates collaborated to produce the information necessary to evaluate this group of aspiring families. From the beginning, even when the rights sought and conferred were meager, marriage has provided the template of best practices against which both advocates and regulators have measured same-sex relationships. As Douglas NeJaime demonstrates in his

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*Review*) (describing Supreme Court's October 6th ruling). On October 6, 2014, the Supreme Court let stand five federal circuit court opinions holding state bans of same-sex marriage unconstitutional. *Id.* Other states in these federal circuits are bound by these holdings, increasing the number of states allowing same-sex couples to marry. *Id.*

259. This ubiquitous claim was made recently in the briefs of the state of Utah appealing a district court's holding that its statute restricting marriage to different sex couples is unconstitutional. See State Defendants' Reply in Support of Motion for Stay Pending Appeal at 9, *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013) (No. 2:13-cv-217), 2013 WL 7175328 ("[M]an-woman marriage promotes the State's compelling interest in the care and well-being of children (and society) by facilitating responsible procreation and the ideal mode of child-rearing.").

260. See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 948 (N.D. Cal. 2010) (evaluating and rejecting claims by plaintiffs that "children raised by their married, biological parents do better on average than children raised in other environments"), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), vacated and remanded sub nom. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); see also *Goodridge*, 798 N.E.2d at 962–64 (rejecting state's claim that children raised by gay parents suffered harm).

261. For example, David Blankenhorn, the advocate who argued in *Perry v. Schwarzenegger* that children were harmed by same-sex parents, abandoned his position in 2012 (on the ground that children benefited from the stability of marriage). Ethan Bronner, *Gay Marriage Gains Backer as Major Foe Revises Views*, N.Y. Times (June 22, 2012), <http://www.nytimes.com/2012/06/23/us/david-blankenhorn-drops-opposition-to-gay-marriage.html> (on file with the *Columbia Law Review*).

interesting study of LGBT-rights advocacy in California in the 1980s and 1990s, advocates and couples argued consistently in different legal settings that same-sex unions were marriage-equivalent and different from the casual affiliations of heterosexual couples who chose not to marry.<sup>262</sup> Moreover, lawmakers required, as a condition of even limited legal recognition, that qualifying relationships be marriage-like. Under California domestic-partnership ordinances and statutes, for example, domestic partners were defined as two individuals, not related by blood or marriage, who “share the common necessities of life”<sup>263</sup> and “declare that they are each other’s principal domestic partner.”<sup>264</sup> As NeJaime points out, the language reflected an effort to define the responsibilities and commitment of domestic partners as equivalent to those of married couples.<sup>265</sup>

Two important purposes were served by defining domestic partnerships as marriage-equivalent. First, domestic-partnership status provided same-sex couples with another and clearer means of signaling the quality of their relationships, expediting the process of public acceptance. Registration as domestic partners may have carried few tangible benefits, but the act announced to the world that couples were in a committed interdependent relationship. Second, domestic-partnership and civil-union registration has some similarity to the collaborative “best practices” process described in Part II: The aspiring couples provided information to the state about how they planned to fulfill their family functions, the parties collectively established benchmarks that embodied their expectations for the support and care of family members, and lawmakers could use domestic-partnership registration by same-sex couples to monitor compliance with advocates’ claims that many gay couples lived in marriage-like unions.<sup>266</sup>

The third aspect of the process of legal reform that merits attention is the extent to which lawmakers have conferred legal protection of same-sex relationships through registration and licensing, rather than through judicial recognition of informal unions. Although *de facto* parents have had some success in obtaining visitation rights in custody disputes, only

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262. See NeJaime, *supra* note 80, at 114–21 (describing approaches of domestic-partnership advocates in Northern and Southern California).

263. *Id.* at 119 (quoting Memorandum from Human Relations & Welfare Comm’n to Hon. Mayor & Members of the City Council 20 (July 17, 1984)). This language was based on California case law defining marital obligations. *Id.* at 117.

264. *Id.* at 115 (quoting An Ordinance to Create a Record of Domestic Partnerships (Draft) (1982)).

265. *Id.*

266. Thus, for example, if most domestic partnerships failed, advocates’ claims about the nature of these unions would have been weakened. Of course, not all aspiring families are modeled on marriage. This suggests that some novel family groups may face different challenges as they seek legal recognition and that regulators may also need to adopt different verification strategies to evaluate these groups. This issue is addressed below in Part III.C.

rarely in the past decade have courts and legislatures conferred rights and obligations on same-sex couples living in informal unions. The ALI Domestic Partnership Principles, under which couples living in informal unions are subject to the inter se rights and duties of marriage, have gained little traction.<sup>267</sup> Given the momentum toward greater legal protection of same-sex relationships, this may seem surprising. But as suggested in Part II, a licensing approach has many advantages. Registration is an efficient and privacy-protective mechanism for resolving the daunting verifiability problems faced by lawmakers aiming to offer family benefits only to those groups that fulfill family functions. By allowing couples to signal that their relationship is based on mutual commitment and responsibility, registration assists regulators in distinguishing unions that warrant legal protection from more casual affiliations without costly probing inquiries.

### B. *The Incomplete Recognition of Cohabitation Relationships*

Although LGBT-rights advocates have enjoyed considerable success in attaining legal recognition of same-sex family relationships, informally cohabiting couples in this country have received few legal protections.<sup>268</sup> Public hostility or ignorance about cohabitation cannot explain lawmakers' failure to confer legal protection on cohabitants; surveys indicate substantial tolerance of informal unions.<sup>269</sup> Yet many couples live together in marriage-like relationships with few of the state benefits associated with marriage and without the obligations to one another that protect spouses on divorce. The analysis in Part I suggests that a liberal society should confer legal protection on all groups that fulfill family functions satisfactorily. Why then have same-sex couples been so successful in attaining the legal benefits awarded to families while cohabitants have largely been left unprotected?

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267. See Clisham & Wilson, *supra* note 189, at 610 (reporting no state has adopted ALI domestic-partnership status); *supra* note 189 (discussing ALI domestic partners' rights and obligations).

268. For a discussion of the very limited legal protections enjoyed by unmarried couples, see Ellman et al., *supra* note 52, at 967–73. Some have criticized the limited availability of legal protections and have proposed reform. See Polikoff, *Beyond Marriage*, *supra* note 1, at 3–4 (describing and critiquing lack of legal protection of unmarried couples); Cherlin, *supra* note 69, at 292–94 (proposing greater legal protection for cohabiting parents); Ann Laquer Estin, *Ordinary Cohabitation*, 76 *Notre Dame L. Rev.* 1381, 1383–84 (2001) (describing absence of rights and obligations between cohabitants); Weiner, *supra* note 58, at 160 (arguing for increased rights and obligations between unmarried parents).

As Polikoff has noted, unmarried couples in Canada and other countries have been more successful in attaining legal protections. Polikoff, *Beyond Marriage*, *supra* note 1, at 111–20.

269. See Pew Research Ctr., *The Decline of Marriage*, *supra* note 7, at 7–8 (finding majority of public is either neutral or positive about cohabitation (including unmarried couples raising children)).



Our analysis of the impediments facing aspiring families and the means of overcoming these obstacles through collaboration sheds light on this puzzle. Two interrelated features of cohabitation have impeded progress toward legal recognition and left cohabitants with few of the legal rights and duties conferred on protected families. First, the category of cohabitants includes a broad range of couples with varying intentions for their relationships. Some cohabiting relationships are based on enduring commitment and interdependence; for psychological or ideological reasons, these couples have chosen not to enter legal marriage.<sup>270</sup> Other couples are experimental and tentative in their commitment; they may or may not develop into long-term family relationships. Still other cohabitants affirmatively reject commitment and financial interdependence: Indeed, this is a significant reason not to marry.<sup>271</sup> Of course, this variability might describe gay and lesbian unions as well. But the difference, emphasized by LGBT-rights advocates, is the second feature of cohabitation that has complicated the path to family recognition. The decision *not* to marry when marriage is an option sends a confusing signal about the nature of cohabitants' relationships and the extent to which they are defined by family-commitment norms. This uncertainty impedes the sorting of those informal unions that serve family functions adequately from more casual relationships that do not. The uncertain signal created by the choice not to marry, together with the variability among cohabiting couples, has hindered network formation and normative integration; it also poses challenging verifiability problems for regulators. In short, the defining features of cohabitation as a category create the uncertainty that has inhibited progress toward legal recognition.

1. *Cohabitation and Norm Creation: Networking and Integration.* — Researchers have found that cohabitants have lower levels of commitment to their relationships than do married couples;<sup>272</sup> perhaps for this reason, informal unions typically are far less stable than marriages. This is partly due, of course, to the diversity among cohabiting couples described above. For many couples, cohabitation is experimental, a way for each cohabitant to evaluate whether the relationship is viable and the other party a trustworthy and compatible life partner. Thus, within three

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270. Contractual claims for property and support are often brought by parties whose informal union was marriage-like. See *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892, 901 (Ct. App. 1993) (rejecting support claim by partner at dissolution of twenty-five-year relationship with two children).

271. See Judith Seltzer, *Families Formed Outside of Marriage*, 62 J. Marriage & Fam. 1247, 1250 (2000) (noting relationship between couples' economic goals and attitudes toward marriage).

272. See *supra* notes 73–74 (discussing relationship outcomes of cohabiting couples); see also Stephen L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. Fam. Issues 53, 56–58 (1995) (noting lower levels of commitment in cohabiting couples).

years, many informal unions either end or transition to marriage.<sup>273</sup> Like same-sex couples, some different-sex couples may deal with the uncertainty of their relationships by entering into collaborative contracts in the early experimental phase. But as other scholars have noted, cohabiting couples infrequently execute formal contracts regarding property sharing and future support: Plausibly this is because many couples who collaborate successfully see marriage as a superior option to formal contracting.<sup>274</sup>

Unlike the pattern observed among same-sex couples, there is little evidence that cohabiting couples generally affiliate in normative communities that support and reinforce their family relationships. This also is likely due to the variations among cohabitant relationships. Couples who eschew commitment likely have little in common with those in long-term, marriage-like unions (who indeed may present to the community as married couples).<sup>275</sup> Moreover, social class plays a role in cohabitation patterns, with poor and less educated couples being more likely to dissolve their relationships and less likely to marry before having children than those who are more educated.<sup>276</sup> This diversity likely deters the development of collaborative networks that reinforce behavioral expectations promoting care and interdependence. Stephen Nock has argued that, in contrast to marriage, cohabitation is “under-institutionalized,” lacking a strong set of stabilizing social norms.<sup>277</sup> Consistent expectations

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273. The National Survey of Family Growth found that forty percent of first cohabitation transitioned to marriage by three years. Copen, Daniels & Mosher, *supra* note 73, at 5. Many of these cohabiting couples likely are determining whether they *want* to undertake a more serious commitment to one another. Almost half of the relationships that did not transition to marriage (twenty-seven percent of the total group) dissolved in three years; thirty-two percent were intact at three years. *Id.*

274. See Ellman, *Contract Thinking*, *supra* note 188, at 1375 (describing successful marriages as not “based upon parties’ compliance with any agreement explicit enough in its terms for the law sensibly to treat it as a contract”). Same-sex couples who cannot marry are often advised to execute contracts to afford legal protection to their relationships. See, e.g., *Model Cohabitation Agreement*, *supra* note 213. Different-sex couples have the option of formalizing their commitment through marriage, which many do. Cf. Ellman, *Contract Thinking*, *supra* note 188, at 1380 (noting same-sex couples’ greater interest in contract due to unavailability of marriage).

275. See *Friedman*, 24 Cal. Rptr. 2d at 894 (describing situation in which associates thought couple in twenty-one-year relationship were married).

276. See Carbone & Cahn, *supra* note 68, at 13–20 (providing general discussion of role of social class in cohabitation patterns); see also Edin & Kefalas, *supra* note 69, at 104–37 (discussing attitudes toward marriage among poor women); cf. Vivian E. Hamilton, *Family Structure, Children, and Law*, 24 Wash. U. J.L. & Pol’y 9, 14 n.22 (2007) (“[C]hildren in . . . cohabiting families are almost three times as likely to be poor as children in married-parent families.” (quoting Adam Thomas & Isabel Sawhill, *For Love and Money? The Impact of Family Structure on Family Income, Future Child.*, Fall 2005, at 57, 63)).

277. See Nock, *supra* note 272, at 55 (describing cohabitation as underinstitutionalized).

for cohabitants' behavior or goals would fit poorly with the broad range of relationships in the category.

Nor do we find evidence that groups of cohabitants or their advocates collaborate to further their common interest in attaining legal protection. Cohabitants experience most of the legal disadvantages that same-sex couples have suffered: They are excluded from government benefits conferred on married couples and other legal protections; moreover, absent contract, the parties have few obligations to one another.<sup>278</sup> Yet the response to these exclusions has been relatively passive. To be sure, advocates for poor families, which include many cohabitants and their children, seek generally to better lives strained by poverty. But these efforts focus largely on improving child welfare and not directly on extending legal recognition to cohabitants.<sup>279</sup> There appears to be no evidence of network formation aimed at extending legal protection to cohabitation as a family category. Perhaps this is because the vulnerability of nonmarital unions can easily be remedied by marriage. Straight couples likely sometimes marry to avoid the frustration and harms of nonmarital status, even if their preference might be to continue to cohabit. Those cohabitants who do not marry must solve a difficult collective-action problem if they are to pursue legal recognition and protection of their nonmarital families.

The process of normative integration into the larger community also has not proceeded in a way that would position cohabitants to attain legal protection. The LGBT drive to attain family rights was instrumental in fostering normative integration of same-sex couples into the broader community and in shaping public attitudes about the character of their family relationships. Cohabitants are not subject to the hostility that same-sex couples endured; thus, in some sense, informal families already enjoy public acceptance. But this does not translate into public support for elevating cohabitants to the status of fully protected legal families. This is not surprising since cohabitants have not signaled their commitment to family-functioning norms. Instead, the wide range of cohabiting relationships means that the signals are noisy: Couples in casual or tentative relationships do not signal long-term commitment while many couples in durable and committed unions often do not announce their unmarried status at all.<sup>280</sup>

2. *Cohabitation and the Verifiability Problem.* — Even if cohabitants formed networks to advocate for legal recognition of their families,

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278. See Ellman et al., *supra* note 52, at 967–73 (describing cohabitants' lack of legal protections enjoyed by spouses); *supra* text accompanying notes 48–58 (discussing legal rights, obligations, and benefits of marriage not conferred on cohabitants).

279. See McLanahan & Garfinkel, *supra* note 27, at 149, 154–57 (presenting evidence of poorer outcomes in child development and health in children born to unmarried parents and arguing for various reforms).

280. See *Friedman*, 24 Cal. Rptr. 2d at 894–95 (describing situation in which associates assumed long-term cohabitants were married).

regulators would face difficulty in verifying cohabitation as a family category. The broad range of cohabitants includes many couples who lack the qualities of well-functioning families but who may seek family status with its benefits and privileges. Coresidency in an intimate union is unlikely by itself to serve as an adequate basis for designating informal dyads as families, and sorting couples in committed relationships from less deserving types poses a challenge for regulators. Because informal unions lack the clear commitment signal provided by registration,<sup>281</sup> accurate determination of family status requires a costly factual inquiry that threatens privacy<sup>282</sup> and is prone to error. Courts have occasionally been willing to make these determinations, but typically it has been in situations where simpler mechanisms for signaling family status are unavailable.<sup>283</sup> As the lukewarm response to the ALI Domestic Partnership Principles demonstrates, state actors resort only reluctantly to this ex post approach to determining family status.<sup>284</sup>

Some cohabiting couples are clearly in family relationships, and regulators may be able to employ a few straightforward proxies to minimize verifiability problems. For example, biological parenthood could serve as a basis for creating family bonds between cohabiting parents. Currently, unmarried parents living together have no financial or other duties to one another, although both parents have substantial obligations to their children. The combination of shared parenthood and cohabitation could function as a verifiable proxy subjecting the couple to family obligations and entitling them to the benefits that legal families enjoy.<sup>285</sup> Cohabitants can also be classified on the basis of the duration of their unions. Most cohabiting couples separate or marry in a few years: A couple who live together for five years or more can be assumed to be in a marriage-like relationship, with the attendant rights and duties, unless they opt out contractually from family obligations.<sup>286</sup> Well-designed proxies such as these would allow regulators to sort cohabitants in family

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281. For example, marriage licensing is the mechanism for imposing binding obligations of mutual care and interdependence, which cohabitants only undertake through contract.

282. See Case, *Marriage Licenses*, *supra* note 178, at 1772–73 (showing how licensing of marriage protects against intrusive government inquiry).

283. See *supra* note 81 and accompanying text (discussing judicial recognition of functional family relationships); see also *supra* notes 209–212 and accompanying text (discussing cases in which courts enforced agreements between cohabitants).

284. See Clisham & Wilson, *supra* note 189, at 576 (finding little impact of ALI Domestic Partnership Principles on state legislatures).

285. See Weiner, *supra* note 58, at 135–36 (arguing family rights and obligations toward one another should be assigned to cohabitants who have a common child); see also Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 *J.L. & Fam. Stud.* 1, 45–48 (2007) (presenting similar argument).

286. See Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 *U. Chi. Legal F.* 225, 259 (arguing couples who have cohabited for five years typically are in marriage-like relationships and should be subject to default rules regulating property sharing and support on divorce).

relationships from those whose commitment (and social value) is less compelling.

C. *Non-dyadic Novel Families: Navigating New Territory*

Both same- and different-sex cohabiting couples are in intimate dyadic relationships and have been measured against a template based on marriage. For same-sex relationships, this familiar model has simplified and facilitated normative integration and, ultimately, verification by regulators of the qualities of couples aspiring to gain legal protection. Other aspiring families, however, may lack ready models of family behavior to provide them with normative guidelines or to assist others in evaluating their functioning. Polygamous, multigenerational, and voluntary kin groups may all function as viable families, but to some extent they are pioneers adapting behavior and structuring family obligations to suit their unique forms. To be sure, some such families—such as multigenerational relationships—are familiar, but they have thus far functioned informally without the goal of full legal protection.<sup>287</sup> In general, these novel families face the initial task of structuring their family relationships through experimentation and adaptation without the template that marriage provides.

These groups are characterized by one of two features—some by both—that distinguish them from families modeled on marriage. The first is that they often include more than two adult parties.<sup>288</sup> A group that includes multiple adults is more complex than a dyad in ways that generate uncertainty about its functioning. Avoiding exploitation, imposing obligations fairly and efficiently, and protecting the interests of adult members who dissent from decisions by the majority require more complex mechanisms than are needed to regulate an equalitarian dyad.<sup>289</sup> Second, while polygamous relationships involve sexual intimacy, other aspiring unions are not based on conjugal bonds among the adults. The combination of multiple parties and asexual relationships creates uncertainties about the stability and functioning of these novel families that are different from, and possibly greater than, those families based on the model of marriage. For multigenerational groups, of course, this uncertainty may be offset by genetic ties and by historical tradition. But other

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287. Grandparents in the 1980s and 1990s did lobby successfully for the enactment of grandparent-visitation statutes. See Ellman et al., *supra* note 52, at 732–33 (discussing grandparents' visitation rights). But see *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (holding application of Washington grandparent-visitation statute violated parents' constitutional rights); *Moore v. City of E. Cleveland*, 431 U.S. 494, 499–500 (1977) (rejecting zoning ordinance that effectively excluded grandparent raising her grandchild from definition of "family").

288. A multigenerational or voluntary kin family could include just two adults, but many will include more. For simplicity, this Article does not deal specifically with dyads.

289. See Davis, *supra* note 8, at 1958–61 (explaining governance challenges facing polygamous groups and offering partnership model in response).



non-dyadic groups may face greater challenges in demonstrating their viability as stable families.

1. *Polygamous Groups*. — In the current climate, it may seem fanciful to discuss the path to legal recognition for polygamous family aspirants. In contemporary American society, polygamy is largely associated with fundamentalist Mormon communities and other notorious cultlike groups that are generally viewed with hostility for posing a severe risk to teenage girls who reportedly are coerced into sexual relationships with older men.<sup>290</sup> On this ground, fundamentalist Mormons have been subject to child-protection interventions, and their leaders have faced criminal prosecution.<sup>291</sup> These groups are deeply hierarchical, with women occupying subservient positions in a male-dominated oligarchy—a family structure that is discordant with contemporary norms of gender equality.<sup>292</sup> Finally, because outlaw polygamous groups include a small number of (usually older) men with many wives, young men are often expelled from their communities.<sup>293</sup> It is fair to say that polygamous families are unlikely to attain public acceptance or legal recognition so long as fundamentalist religious polygamists represent the archetypical model.

But attitudes toward polygamy appear to be softening somewhat, as evidenced by the popularity of the television series *Big Love* and the real-

290. The Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS) is led by Warren Jeffs, who has been convicted in several states of criminal offenses related to the coercion of minor girls to “marry” adult men. See Mark Shurtleff, *Religion and Non-State Governance: Warren Jeffs and the FLDS*, 2010 Utah L. Rev. 115, 118–21 (transcribing then-sitting Utah Attorney General’s speech discussing Warren Jeffs and his criminal history with minors). A polygamous cult, the Branch Davidians, attracted worldwide notoriety when it engaged in a shootout with federal agents resulting in dozens of deaths at its compound near Waco, Texas in 1993. Branch leader, David Koresh, had multiple “spiritual” wives, including reportedly underage minors. See Malcolm Gladwell, *Sacred and Profane: How Not to Negotiate with Believers*, New Yorker (Mar. 31, 2014), <http://www.newyorker.com/magazine/2014/03/31/sacred-and-profane-4> (on file with the *Columbia Law Review*) (discussing David Koresh and detailing events at Waco).

291. In a notorious Texas case, allegations of sexual abuse of underage girls led to the removal of 468 children by the Texas Department of Family and Protective Services from the Yearning for Zion Ranch, a FLDS community. In re Tex. Dep’t of Family & Protective Servs., 255 S.W.3d 613, 613–14 (Tex. 2008). The Texas Supreme Court upheld an appellate court’s order vacating state custody, finding that, despite evidence of a pattern of sexual abuse of pubescent girls on the ranch, children not at risk were removed and those at risk could have been protected without removing them from their parents’ custody. See id. at 615 (noting Family Code did not give courts authority to remove children from home, though other means—such as protective orders—could be employed).

292. See Jon Krakauer, *Under the Banner of Heaven: A Story of Violent Faith* 11–15 (2004) (describing fundamentalist polygamous family in which women are taught to strictly follow “[p]erfect obedience”).

293. See Julian Borger, *The Lost Boys, Thrown Out of US Sect so that Older Men Can Marry More Wives*, Guardian (June 13, 2005, 7:02 PM), <http://www.theguardian.com/world/2005/jun/14/usa.julianborger> (on file with the *Columbia Law Review*) (noting there are over 1000 “lost boys” who have been “separated from their parents and thrown out of their communities by a polygamous sect to make more young women available for older men”).

ity show *Sister Wives*, both depicting rather conventional polygamous families.<sup>294</sup> Further, the legal basis for prohibiting polygamous families may be eroding. In 2013, in a case involving the family depicted in *Sister Wives*, a Utah federal district court held unconstitutional a state criminal ban on polygamy.<sup>295</sup> Fundamentalist Mormon men practicing polygamy typically enter multiple *religious* marriages but have only one legal wife. On this basis, the court applied *Lawrence v. Texas* to hold that the prong of the Utah bigamy statute prohibiting cohabitation by a legally married person violated the individuals' right of privacy protected under the Fourteenth Amendment.<sup>296</sup> Further, the court found that the Utah law interfered with the free exercise of religion in targeting a particular group.<sup>297</sup> None of this indicates that polygamy has gained public acceptance, but it does suggest some change in public attitudes and a movement toward decriminalization, an essential step in the process leading to legal recognition.<sup>298</sup>

Although some polyamorous groups may value the fluidity and liberty that parties in unregulated relationships enjoy,<sup>299</sup> others (such as the hypothetical polygamous family described in Part II) might aspire to relationships based on commitment and interdependence.<sup>300</sup> For those in

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294. See generally Kaitlin R. McGinnis, Casenote, *Sister Wives: A New Beginning for United States Polygamist Families on the Eve of Polygamy Prosecution?*, 19 Vill. Sports & Ent. L.J. 249, 257–60 (2012) (discussing impact of *Sister Wives* and *Big Love* on public perception of polygamous relationships). The website of *Sister Wives* describes the purpose of the show as showing viewers how the polygamous Brown family “navigate[s] life as a ‘normal’ family in a society that shuns their lifestyle.” What’s New with the Sister Wives, TLC, <http://www.tlc.com/tv-shows/sister-wives/about-the-show/about-sister-wives/> (on file with the *Columbia Law Review*) (last visited Feb. 4, 2015).

295. *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1234 (D. Utah 2013). *Brown* rejected the authority of *Reynolds v. United States*, 98 U.S. 145 (1879), a nineteenth-century Supreme Court opinion upholding the constitutionality of such a ban. See *Brown*, 947 F. Supp. 2d at 1189 (“[T]he court believes that *Reynolds* is not, or should no longer be considered, good law, but also acknowledges its ambiguous status . . .”).

296. See *Brown*, 947 F. Supp. 2d at 1222–25 (“The cohabitation prong of the Statute does not survive rational basis review and must be stricken as a violation of substantive due process under *Lawrence*.”). Other courts have disagreed. See, e.g., *State v. Holm*, 137 P.3d 726, 743 (Utah 2006) (holding polygamy implicates marriage and thus is outside privacy protection of *Lawrence*).

297. See *Brown*, 947 F. Supp. 2d at 1209–21 (noting cohabitation prong of law was not “operationally neutral”).

298. Of course, *Lawrence v. Texas* provided this step in the marriage-equality movement.

299. See Emens, *Monogamy’s Law*, *supra* note 35, at 309–30 (discussing commitment to free sexual expression among many polyamorists). Some advocates for polyamory may respond similarly to critics arguing that the marriage-equality movement has limited the freedom of gays to live their intimate lives free of the constraint of marriage. See Franke, *Longing*, *supra* note 59, at 2689 (“The challenge of this moment is to conceptualize a legal strategy that takes on the exclusivity of marriage by repudiating the homophobia that underwrites the exclusive, while not ratifying the normative priority of marriage.”).

300. One polyamory website reports polyamorous groups in committed partnerships and undergoing commitment ceremonies. Loving More Polyamory Frequently Asked

the latter category, family status may be a desirable goal, made more plausible by the success of the LGBT marriage-equality movement.<sup>301</sup> Aspiring polygamous families confront two challenges, one common to multiparty adult relationships generally and the other familiar from the LGBT experience. Like other families with multiple adults, polygamous groups aiming for recognition must create governance structures that promote stability, while ensuring a fair distribution of rights and obligations, without the guidance provided by the dyadic model of marriage. In addition, like same-sex couples, polygamous groups face the formidable challenge of moving from outlaw status to integration into the broader normative community. Moreover, aspiring polygamous families must overcome a challenge not confronted by gays and lesbians—the reputational harm created by the actual practices of fundamentalist polygamists.<sup>302</sup>

The first challenge for aspiring polygamous families is to create a collaborative agreement sufficient to overcome high levels of uncertainty about the viability of this relationship form. Multiparty contracting requires more complex governance structures than does bilateral agreement.<sup>303</sup> In addition to the challenge of specifying mutual obligations and responsibilities, parties must structure their relationships and performance to avoid exploitation of all members and also address the key question of how to resolve disagreements.<sup>304</sup> Adrienne Davis has suggested that this challenge can be met by adapting the default rules governing partnership relationships.<sup>305</sup> These rules protect dissenting members from exploitation by the majority and permit exit from the partnership by dissenting minorities under specified conditions.<sup>306</sup> In addition, the parties can contract for a unanimity rule governing all fam-

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Questions or FAQ, Loving More, <http://www.lovemore.com/faq> [hereinafter Loving More FAQ] (on file with the *Columbia Law Review*) (last visited Feb. 4, 2015).

301. See Davis, *supra* note 8, at 1957 (describing how both supporters and detractors of polygamous-marriage rights view goal as more plausible in wake of marriage equality for gays).

302. See *supra* notes 290–293 and accompanying text (describing association of FLDS with sexual abuse and other harms to children). In contrast, no evidence supports allegations that children of gay parents suffer harm by virtue of their parents' sexual orientation. See *supra* notes 259–261 and accompanying text (discussing cases that have rejected such allegations as groundless).

303. Fabrizio Cafaggi, Introduction to Contractual Networks, Inter-Firm Cooperation and Economic Growth 9 (Fabrizio Cafaggi ed., 2011) (discussing complexity of multiparty contracts in commercial context).

304. As our colleague Liz Emens points out, the risk of coercion may be as great in dyadic relationships.

305. Davis, *supra* note 8, at 2003–04.

306. Some polygamists favor a structure in which the entity endures, but individual members are free to withdraw. See Davis, *supra* note 8, at 2011–12 (likening plural marriages to commercial associations, as members in both may desire to remain associated upon another member's exit). A partnership model of governance would incorporate the fiduciary duties of care and loyalty.

ily decisionmaking. Here, the threat of dissolution of the relationship should the parties fail to agree on a course of action deters frivolous disagreements and encourages compromise. Under this regime, parties are able to learn rather quickly whether their partners are capable of adequate family functioning and whether they have the capacity for collaborative decisionmaking. Such an environment has been shown to create bonds of trust in commercial relationships based on similar collaborative structures. The success of multiparty professional partnerships and other commercial collaborations suggests that there are available models to solve the contracting problems facing polygamous groups who wish to test the durability of their relationship through contract.

But even if individual polygamous relationships can be sustained through collaborative and formal contracting, these groups face a daunting task seeking to move from outlaw status to integration with the larger normative community. Just as same-sex intimacy was criminalized in the pre-*Lawrence* era, (at least some) polygamous unions are often prohibited under criminal law.<sup>307</sup> For this reason, polygamous groups are likely to be secretive; as with same-sex couples, this inhibits the formation of normative networks and, ultimately, acceptance by the broader social community. Moreover, a powerful strategy deployed by LGBT-rights advocates for gaining public acceptance and legal reform, the identification of same-sex unions with marriage, is likely not available to polygamous groups. Further, stable commitment may seem to be incompatible with the simultaneous maintenance of multiple intimate relationships; if so, polygamous relationships may be perceived as offending the strong social norm against adultery.

But polygamists have been heartened by the LGBT movement, the success of which may function as a catalyst that emboldens polygamist groups to live more openly and to pursue legal recognition of their family relationships. If these groups function as stable, caring units in which adult members relate to one another on the basis of equality and minors are not exploited, polygamous families plausibly can signal to the larger community that they are committed to family-functioning norms. As with the LGBT marriage-equality movement, a key element of this process is the formation of networks of aspiring families and their advocates. Effective legal and social advocacy by norm entrepreneurs on behalf of contemporary polygamous groups might gradually supplant religious polygamists in the public imagination. Indeed, the process of network formation has begun, facilitated by the Internet, with the emergence of interest groups whose goals are to promote interaction among polygamists, disseminate information to correct negative impressions, and ulti-

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307. See, e.g., The Family Support Ctr., *The Primer: A Guidebook for Law Enforcement and Human Services Agencies Who Offer Assistance to Fundamentalist Mormon Families* 53–59 (2011), available at <http://www.familysupportcenter.org/Primer.pdf> (on file with the *Columbia Law Review*) (cataloguing laws that can be used against polygamists in various states).

mately acquire plural-marriage rights. The website of one such group announces that “[f]reely-consenting, adult, non-abusive, marriage-committed polygamy is the next civil rights battle.”<sup>308</sup>

Polygamists face particularly daunting challenges in attaining state certification. Because the form is not modeled on the familiar marital dyad and because of the sordid and familiar recent history of polygamy, the state will require extraordinary assurances that these new families are different from fundamentalist cults. Because of these unique obstacles, transparency and cooperation with regulators will likely be essential. The model developed in Part II predicts that an iterative process of collaboration to develop and enforce best practices offers the most plausible path for polygamists to attain family status. To be sure, the goal of attaining marriage rights for polygamists may currently seem unlikely, but *Buhman* and other recent developments hint that the legal prohibition of and moral distaste for multiparty intimate unions is beginning to erode. If so, polygamous groups may well be in the early stages of the evolutionary process that leads to legal recognition.<sup>309</sup>

2. *Nonconjugal Aspiring Families.* — Aspiring nonconjugal families include groups that are truly contemporary and those that are quite familiar; both confront unique challenges in attaining legal recognition. Some aspiring families, such as voluntary kin groups, have only recently attracted public interest and attention.<sup>310</sup> Others, such as multigenerational families, have deep roots in American society and have been recognized by the Supreme Court as having constitutionally protected family status for some purposes.<sup>311</sup> Nonconjugal groups have some advantages as aspiring families. They avoid the destabilizing risk of infidelity and, because their nonsexual bonds do not incite moral disapproval, they are unlikely to stir public opprobrium. In this regard, the process toward legal recognition may be smoother than that of same-sex couples or polygamous groups. But paradoxically, the absence of conjugal ties may generate skepticism about the durability and stability of some nonconjugal affiliations. Because the legal family has long been modeled

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308. Pro-Polygamy.com, <http://www.Pro-Polygamy.com> (on file with the *Columbia Law Review*) (last visited Feb. 4, 2015). Websites have been very important in the movement to create networks and gain public acceptance of polygamy. See, e.g., Loving More FAQ, *supra* note 300 (providing information about and dismissing myths related to polyamory). Pro-Polygamy.com aims to provide information to media outlets on contemporary polyamory and to dispel myths about polygamous relationships as abusive. *Id.* Network formation is also promoted by [www.polygamylifestyle.com](http://www.polygamylifestyle.com), which allows polygamist groups to find others in their locality. See Polygamy Lifestyle, *supra* note 142.

309. Cf. Goldfeder, *supra* note 1 (noting public opinion remains in favor of banning polygamy but conceding public cannot “continue ignoring the polygamists’ clamor for acceptance”).

310. See, e.g., Angier, *supra* note 29 (examining recent trends in family composition and discussing voluntary kin relationships).

311. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 498–500 (1977) (recognizing right of grandparent to live with grandchild).



on marriage, nonconjugal groups may need to overcome an implicit assumption that a sexual bond reinforces family commitment between unrelated adults. Moreover, like polygamous groups, multimember nonconjugal family aspirants need to create governance structures that promote commitment and avoid exploitation. Finally, some nonconjugal relationships (particularly voluntary kin) fill important family functions, but the parties themselves do not expect the group to satisfy the full range of dependency needs.<sup>312</sup> In short, the evolutionary process whereby these groups might acquire legal protection remains unclear.

a. *Multigenerational Groups*. — These obstacles may be least likely to impede legal recognition of multigenerational families. Extended families have the benefit of both deep historical roots and genetic bonds, ties that are assumed to form a solid basis of family commitment. Indeed, until the twentieth century, when the two-parent nuclear family became the norm, multigenerational families were very common. The Supreme Court, in an opinion rejecting the constitutionality of a zoning ordinance that prohibited a grandson from living in his grandmother's home, famously noted that extended families have played an important role in American society for centuries.<sup>313</sup> But despite the fact that multigenerational families are recognized for some limited legal purposes,<sup>314</sup> and generally are regarded favorably in the public imagination,<sup>315</sup> for the most part these families function informally and do not receive the legal protection of marital families.

In part, this may be due to the complexity of extended families and uncertainty about which genetic family members are, or should be, recognized as a legal family. A family with multiple adults of different generations may include some who are eager to assume durable family obligations in an extended family unit and others whose affiliations are more attenuated, and who may prefer to form smaller units with nonfamily partners. Some members may reside with the group for a period and

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312. See *infra* notes 323–324 and accompanying text (discussing limited functions of some voluntary kin groups).

313. See *Moore*, 431 U.S. at 504 (“Ours is by no means a tradition limited to respect for the bonds . . . of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”).

314. Examples include statutes imposing obligations on adult children to care for parents, grandparent-visitation statutes, and intestate-succession statutes. See, e.g., 23 Pa. Cons. Stat. Ann. § 4603(a)(1) (West 2010) (imposing care obligations on adult children); *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000) (declining to strike down grandparent-visitation statute but finding it violated parental rights as applied); Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*, 48 *Ariz. L. Rev.* 1, 22 (2006) (discussing intestate-succession statutes).

315. See, e.g., Constance Rosenblum, *Together Again: Multigenerational Households on the Upswing*, *N.Y. Times* (Dec. 13, 2013), <http://www.nytimes.com/2013/12/15/real-estate/multigenerational-households-on-the-upswing.html?pagewanted=all> (on file with the *Columbia Law Review*).

then depart. If legal recognition is justified for multigenerational groups with stable long-term commitments to provide mutual care, the state will require a sorting mechanism—beyond genetic ties—to separate those members that fulfill family-functioning needs from those that lack either the willingness or the capability (or both) to fulfill the familial role.

Probably the strongest candidate for full family status is the linear family group composed of grandparent(s), parent(s), and child(ren). It is clear that this familiar type of extended family can function satisfactorily to fulfill family functions. Further, the genetic bond among the members, together with well-defined family roles, reinforces already existing norms of commitment and caring. The primary challenge for these extended families may be the creation of networks with other similar families to pursue their goals of increasing public support and attaining official family status.<sup>316</sup> More complex multigenerational groups pose a greater challenge because they are less familiar to the public and less likely to be bound by family-commitment norms than are linear family groups. Partly for this reason, regulators may find it more difficult to verify the family functioning of these unconventional multigenerational groups.

b. *Voluntary Kin Groups*. — Voluntary kin groups have recently received media attention,<sup>317</sup> but generally they are relatively unfamiliar to the public and to regulators. In part, their emergence can be explained as a product of deficits in the functioning of more traditional family forms with the increase in divorce and decline of extended families in recent decades. Thus, some groups of voluntary kin function as substitutes for marriage or other family relationships. Lacking genetic or legal ties, members assume certain family roles and insist that their relationships are not simply friendships.<sup>318</sup> These groups can take many forms: Variations include two or more divorced or widowed adults, sometimes with their minor children; a parent who has lost an adult child and a younger adult who has assumed that role;<sup>319</sup> and adult friends who decide to live together, share resources, and care for one another in a

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316. An established group such as the AARP might be enlisted to assist in this project. The AARP effectively advocated for laws allowing grandparent visitation in the 1980s, mobilizing grandparents across the country. See Natalie Reed, Note, Third-Party Visitation Statutes: Why Are Some Families More Equal than Others?, 78 S. Cal. L. Rev. 1529, 1536–37 (2005) (describing role of AARP in lobbying successfully in fifty states for statutes).

317. See, e.g., Angier, *supra* note 29 (reporting on voluntary kin families).

318. See Braithwaite et al., *supra* note 4, at 396–402 (describing types of voluntary kin relationships); Marieke Voorpostel, Just like Family: Fictive Kin Relationships in the Netherlands, 68 J. Gerontology: Series B: Psychol. Sci. & Soc. Sci. 816, 816 (2013) (noting fictive kin relations “come into play to fill family-like roles and functions”).

319. See, e.g., Angier, *supra* note 29 (detailing voluntary kin relationship between orphaned friend of deceased man and deceased’s mother).

nonconjugal group.<sup>320</sup> The latter affiliation may include retired seniors who decide to live together for mutual companionship and support.<sup>321</sup>

In one sense, the path to legal recognition might be less difficult for these aspiring families than for gay couples or polygamous groups because voluntary kin are less likely to face public enmity. Moreover, in contrast to some relationships based on sexual intimacy, these nonconjugal groups are formed specifically (and solely) for the purpose of fulfilling family functions.<sup>322</sup> But voluntary kin groups have many varying goals and expectations about their family roles. While some live as committed interdependent families, researchers report that in many relationships the voluntary kin do not purport (or aspire) to satisfy the full range of family functions.<sup>323</sup> Sometimes the relationship is viewed as a supplement to other primary family relationships. For example, lesbian parents may have a relationship with their child's biological father who plays an important role in the child's life but does not assume other family obligations.<sup>324</sup> As with cohabiting couples, this variety predictably can impede the formation of networks based on common interests and complicate the ability to signal the family-like nature of the category. Of course, unlike cohabitants, committed voluntary kin cannot marry and thus groups that do function fully as families predictably can signal their nature more effectively than can cohabitants.

One issue raised by the possibility of assigning family status to voluntary kin and other multi-adult family groups is whether the size of these groups is self-limiting. As suggested above, increasing the number of adults adds complexity and costs to family relationships, along with the risk of exploitation, shirking, and other potential harms.<sup>325</sup> These risks

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320. Asexual individuals who seek to form families would be voluntary kin groups. Asexual couples could "pass" as a married couple but this would deny their identity. For a discussion of asexual identity, see generally Elizabeth F. Emens, *Compulsory Sexuality*, 66 *Stan. L. Rev.* 303 (2014).

321. A Canadian study found that eight percent of widowed individuals include a friend in descriptions of family. *Law Comm'n of Can.*, *supra* note 1, at 5. A variation is the naturally occurring retirement community or NORC. See NORCs: An Aging in Place Initiative, [www.norcs.org](http://www.norcs.org) (last visited Feb. 4, 2015) (promoting communities of "older adults who were living in market rate apartment buildings . . . where older adults were the predominant residents").

322. Our colleague Bert Huang made this point.

323. See Braithwaite et al., *supra* note 4, at 396–402 (listing functions of kin groups); see also Angier, *supra* note 29 (discussing Dr. Braithwaite's research on voluntary kin relationships).

324. More broadly, *de facto* parents represent a category of voluntary kin that may sometimes be in limited family roles. Older adults may assist one another in realizing their healthcare and other caregiving needs but not be financially interdependent, and members may have allegiance to their primary biological families. See Braithwaite et al., *supra* note 4, at 396–402 (describing various types of voluntary kin family relationships).

325. See *supra* notes 303–306 and accompanying text (discussing these problems in polygamous groups); see also Robert Ellickson, *The Household: Informal Order Around the Hearth* 76–85 (2008) (discussing costs and benefits of increased household size).

may tend to increase as members are added, with the result that only multiparty groups with relatively few members are likely to function effectively in fulfilling family functions. Limitations on the size of aspiring families that are able to qualify for legal recognition forestall the possibility that communes or cult groups might register as a voluntary kinship family.

A final important question that we note but do not fully address is raised by the heterogeneity of voluntary kin groups (and some multigenerational families), with many fulfilling a limited range of family functions. Here the question is whether these limited purpose relationships are likely to acquire legal recognition through the evolutionary process described above. To be sure, many individuals in voluntary kin relationships, like some cohabitants, prefer to maintain informal ties. But others may desire legal enforcement of the particular rights and obligations that they have assumed and seek protection of those family bonds.<sup>326</sup> Suggestive evidence of groups attaining limited family rights supports the plausibility of this outcome through some variation of the process we describe. For example, grandparents have lobbied successfully (with the assistance of the AARP, a powerful interest group) to enact statutes that give them standing to seek visitation with their grandchildren.<sup>327</sup> Moreover, at least one state has enacted a statute that allows couples to customize their family relationships by executing “designated beneficiary” agreements in which each party chooses to extend particular rights and protections to the other from a menu of options.<sup>328</sup> It may be that the path to legal protection of more limited family relationships raises fewer or different challenges than those faced by groups who aim to gain social and legal recognition as fully functioning families. But, in any event, that analysis is beyond the scope of this Article.

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326. The involved biological father of a child raised by lesbian parents is one example.

327. See Ellman et al., *supra* note 52, at 732–33 (describing enactment of grandparent statutes across the country). Grandparent websites provide information about grandparent rights. E.g., Am. Grandparents Assoc., [www.grandparents.com](http://www.grandparents.com) (on file with the *Columbia Law Review*) (last visited Feb. 4, 2015). Moreover, some states authorize visitation by de facto parents based on the fulfillment of parental obligations for an extended period of time with the consent of the legal parent. See, e.g., *V.C. v. M.J.B.*, 748 A.2d 539, 555 (N.J. 2000) (authorizing custody or visitation by de facto parent and describing factors). These factors effectively require substantial evidence of commitment to the parental role and a contractual understanding between the de facto and legal parent. But we have not found evidence of networking or advocacy to foster public acceptance. See *supra* notes 276–278 and accompanying text (describing cohabitation patterns and cohabitants’ advocacy strategies).

328. See Colo. Rev. Stat. Ann. §§ 15-22-101 to -112 (West 2011). The parties to the designated beneficiary agreement (DBA) may select any of the sixteen rights and protections on the state-provided form. *Id.* § 15-22-106. These rights include joint ownership of property, hospital-visitation rights, medical-decisionmaking rights, and the ability to sue for wrongful death and to benefit from workers’ compensation. *Id.* § 15-22-105. DBA parties cannot be married to another person. *Id.* § 15-22-104. See generally Erez Aloni, Registering Relationships, 87 Tulane L. Rev. 573, 593–609 (2013) (discussing DBAs).

## CONCLUSION

The past decade has witnessed a dramatic change in public attitudes and legal status for same-sex couples who wish to marry. These events demonstrate that the legal conception of the family is no longer limited to traditional marriage. At the same time, the lack of substantial movement toward granting legal benefits to unmarried cohabitants is evidence that the state remains committed to a welfarist criterion for granting legal status, one that embodies a commitment to family-functioning norms; as a category, cohabitants are too diverse to satisfy this criterion. Viewed together, both of these developments suggest that other groups aspiring to legal recognition as families must overcome substantial uncertainties if they are to achieve their ultimate objectives. At the core, overcoming these uncertainties requires establishing trust at every level—among the individual members of the aspiring family group, among the individual group and other similar aspirants, and among the network of aspiring families, the larger social community, and the state. Collaborative processes have been shown in other settings to offer a means for creating trust endogenously and thus appear to offer a way forward in the evolution of other novel families. Moreover, collaboration was a crucial element in the successful movement to achieve marriage rights for LGBT couples, and the absence of meaningful collaboration is one factor in explaining the stasis that characterizes the status of unmarried cohabitants. This, then, is the evidence supporting the prediction that the future progress of other aspiring family groups toward legal status will depend in large part on how well they are able to engage the collaborative mechanisms that smooth the path from contract to status.